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Economic Efficiency and Consumer Choice Theory in Nutritional Labeling

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ECONOMIC EFFICIENCY AND CONSUMER CHOICE THEORY IN NUTRITIONAL LABELING

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For purposes of both disclosure and context, I serve as House Judiciary Committee Fellow to U.S. Representative Martin T. Meehan (D-MA), a member of the House Judiciary Committee, and I am advising him on a federal legislative proposal that would incorporate this Article's recommendation for targeted nutritional labeling.

INTRODUCTION

As more Americans consume fast food each year, more Americans are contracting serious diseases related to obesity. Considering that obesity ranks second behind tobacco use as the largest contributor to mortality rates in the United States, and also that it gives rise to greater publicly funded health care expenses than does tobacco, this phenomenon begs the obvious question: to what extent does the growing consumption of fast food contribute to the obesity epidemic and the incidence of disease? If the answer indicates a meaningful contribution, a natural follow-up question then emerges: in a sensible legal system, what instruments would best ameliorate its effects?

In attempting to answer these questions, this Article explores obesity as an economic occurrence, and how varying legal remedies may curtail its deleterious effects on the American economy. In doing so, this Article surveys the proportional causes of obesity, and it identifies fast food consumption as an essential element. In accordance with that finding, this Article ponders whether an absence of nutritional labeling has precipitated overconsumption, and how the law may be optimally utilized to minimize associated inefficiencies.

Specifically, Part I appraises the primary determinants of obesity in the United States, as well as whether Americans knowingly contribute to their corpulence. This is an essential examination, since obesity has morphed into a material public expense, with taxpayers now bearing approximately half of the cost of the nation's girth. Through this analysis, Part I confirms the predictable: most Americans already know that fast food consumption may impair their health. Yet, more engagingly, it also reveals that Americans often underestimate the *extent* of that impairment, in part because they tend to discount the negative contents of restaurant food. Accordingly, many Americans internalize a degree of risk less significant than the actual risk present, thus rendering

their food decision-making process systematically optimistic. This is particularly evident among children, who prove uniquely sanguine.

Part II then scrutinizes federal governmental choices when imposing food labeling requirements, as well as the extent of regulatory authority that has been delegated to the Food and Drug Administration (FDA). Significantly, the federal government has exempted all restaurants from food labeling requirements. The merits of such a privilege bear query, since any exemption from product labeling presumes that consumers engage in a rational assessment of associated risks.

As explored in Part III, however, other relevant actors, such as the State of New York, have concluded otherwise, specifically that consumers often fail to engage in such rational assessment. While adhering to the confines of the federal labeling exemption, these actors have consummated voluntary agreements with fast food companies with the hope of efficiently engineering market incentives for nutritional disclosure. Similarly, certain industry participants, by offering "healthy" dishes, may implicitly signal the less nourishing content of their regular dishes. Thus, in order to fully evaluate the efficacy of the labeling exemption, the supplemental value of these existing and voluntary market influences must also be considered.

Part IV turns to the emerging, though largely quixotic, judicial remedies for Americans who have contracted obesity-related diseases, allegedly due to fast food consumption. Though such lawsuits have been dismissed as trivial by most commentators, they present an excellent vehicle for examining the comparative merits of prospective regulation and retrospective litigation. That is, they suggest something of a recurring miss: a discrete group of individuals appears uniquely inclined to overconsume fast food, thus intimating a traditional common law duty on the part of fast food companies to warn; yet, for purposes of establishing legal causation, identifying and quantifying the proportional causes for any one person's obesity and obesity-related disease proves exceedingly difficult, if not impossible. Thus, such lawsuits continuously fail to satisfy the requisite contours of a tort claim, even though they raise meritorious concerns for social scientists and policymakers alike.

By applying consumer choice theory to fast food consumption, Part V proposes a new theoretical framework that could both conceive a limited common law duty to warn of the dangers of overconsumption and, by immunizing a food seller from tort liability, reward compliance with such a duty. Specifically, this Article postulates revision of the Nutrition Labeling and Education Act of 1990 ("NLEA") to require the divulgence of nutritional information for all fast food items marketed for childhood consumption. In this narrowly tailored setting, the food

decision-making process appears both uniquely optimistic and capable of correction, as parents often dictate or significantly influence the food consumption of their children. In that particular decision-making process, parents internalize an anomalously high value in nutrition and diminished tolerance of risk. Moreover, the imposition of a targeted nutritional labeling requirement would prove strikingly less onerous than more regressive and costly measures, such as an "obesity tax" or a "fast food tax." In short, this form of nutritional labeling would prove uniquely efficacious. Accordingly, regulatory and judicial alternatives may be combined to most efficiently curtail the effects of fast food overconsumption on public health and tax-funded expenditures, while simultaneously removing from the American tort system a legally implausible, though factually credible, claim.

I. OBESITY IN THE UNITED STATES

A. Corpulence and National Health

A discussion of obesity in the United States must begin with the obvious: most Americans are fat. Specifically, over 100 million Americans, or 60% of the adult population, are overweight, with 20% of the population classified as "obese," or more than 20% above their ideal body weight.[1] Of those obese, approximately 90% are "mildly obese," or 20% to 40% above their ideal body weight;[2] 9% are "moderately obese," or 41% to 100% above their ideal body weight;[3] and 2% are "morbidly obese" or over 100% above their ideal body weight.[4]

More troubling, Americans are only becoming heavier. In fact, the Centers for Disease Control and Prevention (CDC) found that the

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1. *See* Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among U.S. Adults, 1999-2000*, 288 JAMA 1723, 1726 (2002); *see also* Roland Sturm et al., *Increasing Obesity Rates and Disability Trends*, 23 HEALTH AFF. 199, 205 (2004) (confirming contemporary accuracy of 2002 data).

2. Flegal et al., *supra* note 1, at 1726 (citing NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL, NATIONAL HEALTH AND NUTRITION EXAMINATION SURVEY 70 (2002)); *see also* Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 28-29 (1997) (providing historical analysis of obesity statistics).

3. Korn, *supra* note 2, at 29.

4. *See* Pamela L. Horn-Ross et al., *Phytoestrogen Intake and Endometrial Cancer Risk*, 95 J. NAT'L. CANCER INST. 1158, 1160 (2003) (defining "morbidly obese"); Richard Perez-Pena & Grant Glickson, *As Obesity Rises, Health Care Indignities Multiply*, N.Y. TIMES, Nov. 29, 2003, at A1 (supplying supplemental data, as well as application of data to health care trends). *But see* Korn, *supra* note 2, at 28-29 (stating that 0.5% of Americans are morbidly obese).

percentage of obese Americans rose a startling 70% from 1991 to 2001.[5] Other studies confirm this trend. For instance, the American Medical Association posits that the cumulative number of obese Americans nearly doubled during the 1990s,[6] while the Joslin Diabetes Center concludes that adult men and women are eight pounds heavier today than they were in 1986.[7]

Paradoxically, Americans have only become heavier while antiobesity warnings have intensified. Indeed, the dangers of obesity have been known for over a half-century. In 1952, the American Heart Association identified excess weight as a cardiac risk factor modifiable through diet and exercise.[8] Since that time, numerous published studies have found that obesity correlates with the increased prevalence of several grievous ailments, including gallbladder disease, high blood pressure, coronary heart disease, and, most often, Type 2 diabetes.[9] Obesity may also inflict severe emotional harm, such as social stigmatization, depression, and poor body image.[10] Also, the FDA

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5. *See* Nat'l Ctr. for Chronic Disease Prevention and Health Promotion, Ctrs. for Disease Control and Prevention, *1991–2001 Prevalence of Obesity Among U.S. Adults, by Characteristics*, *at* http://www.cdc.gov/nccdphp/dnpa/obesity/trend/prev_char.htm (last updated Apr. 22, 2003).

6. *See* Flegal, *supra* note 1, at 1726.

7. *See* Joslin Diabetes Center, *Why Is Obesity a Growing Problem in America?* (citing comments by Dr. Christopher Kollar, a specialist in bariatric surgery or "stomach-stapling," who finds that the average American is fifteen pounds heavier today than in 1993), *at* http://www.joslin.harvard.edu/news/obesity02.shtml (Aug. 2001); *see also* Amy H. Berger, *Marvel's in Medicine*, 29 N.J. MONTHLY 83, 98 (2004) (citing Dr. Kollar as well). Also consider data from the 1976–1980 and 1988–1994 National Health and Nutrition Examination surveys, which reveal the prevalence of the overweight increased from 25% to 35% among American adults. *See* Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REP. 12, 16 (2000).

8. *See* HARVARD SCH. OF PUB. HEALTH, DEP'T OF NUTRITION, FOOD FOR YOUR HEART: A MANUAL FOR PATIENT AND PHYSICIAN (1952).

9. *See generally* Ross E. Andersen et al., *Relationship Between Body Weight Gain and Significant Knee, Hip, and Back Pain in Older Americans*, 11 OBESITY RES. 1159 (2003) (studying effect of weight gain on accelerated deterioration of body parts); James W. Anderson et al., *Importance of Weight Management in Type 2 Diabetes: Review with Meta-Analysis of Clinical Studies*, 22 J. AM. C. NUTRITION 331 (2003) [hereinafter Anderson et al., *Weight Management*] (explaining the effect of obesity on Type 2 diabetes); David S. Freedman et al., *The Relation of Overweight to Cardiovascular Risk Factors Among Children and Adolescents: The Bogalusa Heart Study*, 103 PEDIATRICS 1175, 1175 (1999) (studying the cardiovascular risks from obesity).

10. For a comprehensive discussion on the personal costs of obesity, see Sarah Mustillo et al., *Obesity and Psychiatric Disorder: Developmental Trajectories*, 111 PEDIATRICS 851 (2003). *See also* Comm. on Nutrition, Am. Acad. of Pediatrics, *Prevention of Pediatric Overweight and Obesity*, 112 PEDIATRICS 424, 425 (2003) ("The

actively promotes moderated consumption of calories and fat in order to reduce the risk of excess weight and disease.[11]

Predictably, as more Americans become obese, more Americans contract obesity-related diseases.[12] Less anticipated is the ease at which such diseases may emerge. This is readily observable in Type 2 diabetes, which can be triggered by an excess of only ten pounds, and which has risen in incidence by 33% over the past ten years.[13] More alarming, Americans are contracting Type 2 diabetes and similar obesity-related diseases at earlier ages, thus adversely affecting their long-term health outlook.[14] In fact, the incidence of juvenile diabetes has increased tenfold over the past twenty years,[15] and one in three U.S. children born in 2000 will likely become diabetic.[16] Aggregate figures are even less promising, as it is estimated that between 285,000 and 325,000 Americans die each year due to obesity,[17] and obese Americans live, on average, a decade less than their healthy counterparts.[18]

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psychologic stress of social stigmatization imposed on obese children may be just as damaging as the medical morbidities. The negative images of obesity are so strong that growth failure and pubertal delay have been reported in children practicing self-imposed caloric restriction because of fears of becoming obese."); Korn, *supra* note 2, at 26–28 (supplying further insight on the link between obesity and depression).

11. The Food and Drug Administration (FDA) recommends that fat intake not exceed 30% of the total daily intake of calories, and that the average person consume between 2,000 and 2,500 calories and sixty-five grams of fat daily. *See infra* notes 66–67 and accompanying text.

12. *See* Comm. on Nutrition, *supra* note 10, at 424 (detailing need correlation between necessity for preventative behavior and obesity-related diseases); Sturm, *supra* note 1, at 199 (exploring increase in obesity-related diseases). *See generally supra* note 9 and accompanying text.

13. *See* Joslin Diabetes Center, *supra* note 7. This increase in the incidence of Type 2 diabetes is particularly evident among obese men under fifty-five, who are eight to eighteen times more likely to have Type 2 diabetes than men who are of normal weight. *Id.*

14. *See* Anderson et al., *Weight Management*, *supra* note 9, at 331–32. *See generally* Alexander R. Green, *The Human Face of Health Disparities*, 118 PUB. HEALTH REP. 303, 303 (2003) (discussing effects of diabetes and other diseases on the long-term health of different racial groups).

15. *See* Rinker Buck, *Legal Battleground: Girth of a Nation*, HARTFORD COURANT, July 13, 2003, at A1 (quoting John F. Banzhaf, Professor of Law at George Washington University). *See generally* Christine J. Macaluso et al., *Type 2 Diabetes Mellitus Among Florida Children and Adolescents, 1994 Through 1998*, 117 PUB. HEALTH REP. 373 (2002) (providing study which found that increasing obesity strongly correlates with surging rates in Type 2 diabetes among children ages five to nineteen).

16. Health Newswire Reporters, *Diabetes Threatens U.S. Children*, HEALTH MEDIA GROUP, June 16, 2003.

17. *Of Remarks by Agriculture Secretary Ann M. Veneman at the 2003 Farm Journal Forum*, REG. INTELLIGENCE DATA, Dec. 4, 2003; Katherine Tallmadge, *Eat Less, Live Longer?*, WASH. POST, May 19, 2004, at F1.

18. *See* Ann M. Coulston, *Obesity: New Bad News on Eating Patterns, Liver Disease, and Shortened Life*, 38 NUTRITION TODAY 238, 240–41 (2003).

Perhaps most vividly, obesity ranks second behind tobacco use as the largest contributor to mortality rates in the United States.[19]

B. Taxpayer Absorption of Obesity

Associated with the rise in obesity and obesity-precipitated disease are the medical costs of treatment. For obese people, their excess weight increases annual medical expenses by approximately 37%, including more medication, physician visits, and hospitalizations.[20] Furthermore, obesity and obesity-related diseases may adversely impact employment opportunities and professional advancement.[21]

The cumulative societal costs of obesity are even more staggering. The U.S. Surgeon General's Office estimates that, in terms of lost work and medical expenditures, obesity costs $117 billion annually,[22] or $42 billion more per year than tobacco.[23] This figure also represents 10% of total medical spending.[24] Likewise, rising obesity contributes significantly to costs associated with treatment for obesity-precipitated diseases. For instance, the annual cost of diabetes is now assessed at

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19. *See* Jeffrey P. Koplan & William H. Dietz, *Caloric Imbalance and Public Health Policy*, 282 JAMA 1579, 1579 (1999).

20. JENNIFER NEISNER ET AL., BACKGROUND PAPER ON THE PREVENTION AND TREATMENT OF OVERWEIGHT AND OBESITY 5 (Kaiser Permanente Care Mgmt. Inst., Prepared for the Roundtable: "Prevention and Treatment of Overweight and Obesity: Toward a Roadmap for Advocacy and Action," 2003).

21. *See* Richard A. Posthuma et al., *Beyond Employment Interview Validity: A Comprehensive Narrative Review of Recent Research and Trends over Time*, 55 PERSONNEL PSYCHOL. 1, 23 (2002) (noting that "[a]pplicant obesity had a negative influence on perceptions of personality traits and explained 35% of the variance in hiring decisions"); *see also* Carey Goldberg, *Fat People Say an Intolerant World Condemns Them on First Sight*, N.Y. TIMES, Nov. 5, 2000, at 36 (noting that highly obese women earn 24% less while the moderately obese earn about 6% less). *See generally* Theresa Johnson & Mary C. Wilson, *An Analysis of Weight-Based Discrimination: Obesity as a Disability*, 46 LAB. L.J. 238 (1995) (exploring the issue of weight-related discrimination); Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57 (2002) (arguing for weight-based antidiscrimination protection).

22. OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 10 (2001), *available at* http://www.surgeongeneral.gov/topic/obesity/.

23. *See* Erin Duggan, *Tobacco-Suit Tactics Now Target Fast Food*, TIMES UNION, Apr. 6, 2003, at A1. For an illuminating discussion of the economic costs of tobacco, see generally Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998).

24. Press Release, Centers for Disease Control and Prevention, New Report Highlights U.S. Medical Costs of Injuries (Jan. 15, 2004) (concluding that $117 billion represents 10% of total medical spending), *available at* http://www.cdc.gov/od/oc/media/press/ro40115.htm.

$132 billion and that amount will likely surge to over $1 trillion by 2025.[25]

Equally startling, slightly more than half of these costs are absorbed by taxpayers, who pay about 60% of the $75 billion national health bill added by the overweight and obese.[26] Another way of looking at this $75 billion figure is that the average American taxpayer is annually assessed a $162 obesity tax.[27] Approximately half of these taxpayer expenditures are funneled through Medicare and Medicaid programs,[28] while much of the remaining burden is absorbed by employers, who pay an average annual cost of $8,720 per employee for obesity-related disabilities.[29]

Consequently, while obese Americans may incur direct harm through fast food consumption, health-conscious citizens, businesses, and employers are picking up the tab. This is especially true since among the population, economically disadvantaged Americans are most likely to be classified as overweight or obese, as an inverse relationship exists between weight and socioeconomic status, as well as fitness and socioeconomic status.[30]

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25. Garret Condon, *Diabetes Epidemic Menaces the U.S.; Costs, Suffering Expected to Soar*, HARTFORD COURANT, Sept. 9, 2001, at A1; Nat'l Ctr. For Chronic Disease Prevention and Health Promotion, *Diabetes: A Serious Public Health Problem*, *at* http://www.cdc.gov/nccdphp/bb_diabetes/ (last visited Nov. 17, 2004).

26. *Obesity: American Taxes Pay for Most Obesity Health Ills According to Study*, L. & HEALTH WKLY., Feb. 21, 2004, at 175. For a study of obesity's effect on state budgets, see James Maxwell et al., *Private Health Purchasing Practices in the Public Sector: A Comparison of State Employers and the Fortune 500*, 23 HEALTH AFF. 182 (2004).

27. This figure was calculated as follows: as of July 1, 2003, there were 290,809,777 Americans. U.S. Census Bureau, *Population Briefing National Population Estimates for July 1, 2003*, *at* http://www.census.gov/popest/national/popbriefing.html (last visited Nov. 17, 2004). Eighty-three percent of Americans pay taxes. *The "Hyde-Woolsey" Child Support Bill: Hearing on H.R. 1488 Before the House Comm. on Ways and Means*, 106th Cong. 106-07 (2000) (statement of Geraldine Jensen, President, Ass'n for Children for Enforcement and Support, Inc.). Thus, approximately 241,372,114 Americans pay taxes. Since taxpayers pay $39 trillion for the cost of obesity, the average American pays $161.58.

28. Nat'l Ctr. for Chronic Disease Prevention and Health Promotion, *Overweight and Obesity: Economic Consequences*, *at* http://www.cdc.gov/nccdphp/dnpa/obesity/ecomomic_consequences.htm (last updated June 24, 2004). Note that Medicare and Medicaid cover sicknesses caused by obesity including Type 2 diabetes, cardiovascular disease, several types of cancer, and gallbladder disease. *Id.*

29. *Report Shows Tenfold Increase in Obesity-Related Disability Claims*, HEALTH & MED. WK., Mar. 15, 2004, at 641.

30. *See* Mary Anne Bobinski, *Health Disparities and the Law: Wrongs in Search of a Right*, 29 AM. J.L. & MED. 363, 379 (2003) (explaining correlation between wealth and obesity); *see also* Stephen L. Buka, *Disparities in Health Status and Substance Use: Ethnicity and Socioeconomic Factors*, 117 PUB. HEALTH REP. 118, 120-

C. Explaining Obesity

Given the exorbitant public cost of obesity, taxpayers of all sizes may rightfully ask: why are Americans so fat? And why are they getting fatter? Since gaining weight is simply the result of consuming more calories than are burned, several specific and undoubtedly related explanations arise.

First, most Americans fail to exercise regularly. Although gym memberships have risen steadily in recent years, only 10% of Americans belong to a gym,[31] only 3% exercise sixty minutes or more a day,[32] and less than one in five claims to exercise three or more times a week.[33] Moreover, to the extent Americans exercise, they tend to partake in relatively low-intensity activities, such as walking or light weightlifting.[34] Income may also affect exercise regimen, as those in higher income brackets tend to exercise more often than those in lower brackets.[35]

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21 (Supp. 1 2002) (noting correlation between wealth and fitness); Chris Power et al., *The Duration and Timing of Exposure: Effects of Socioeconomic Environment on Adult Health*, 89 AM. J. PUB. HEALTH 1059, 1062 (1999) (finding that exposure to socioeconomic disadvantage both in early life and in adult life increases the chances of poor health in adulthood).

31. *See Innovative Weight Management System Tackles the U.S. Fat Epidemic; Safe, Natural System Restores Metabolism While Cleansing the Body of Harmful Toxins*, PR NEWSWIRE, Feb. 12, 2003.

32. Suz Redfearn, *Take a Walk*, WASH. POST, Oct. 1, 2002, at F6; *see also* Office of the Surgeon Gen., *supra* note 22, at 2 (noting that 40% of adults in the United States do not participate in any leisure-time physical activity).

33. *See* Patricia M. Barnes et al., *Physical Activity Among Adults: United States, 2000*, 333 ADVANCED DATA FROM VITAL AND HEALTH STATISTICS 1, 1, 19–20 (2003) (presenting a study which finds that only 19% of adults exercise three or more times a week); *see also* Judy Putnam, *U.S. Food Supply Providing More Food and Calories*, 22 FOOD REV. 2, 2 (1999) ("More than 60 percent of American adults are not regularly physically active, and 25 percent of adults are not active at all.").

34. *See Overweight Americans: Need More Exercise, CDC Says*, AM. HEALTH LINE, Apr. 21, 2000 (noting that the average overweight person exercises usually by walking). However, this is not to argue that walking or other low-intensity exercises are without value. Indeed, if an averaged-sized woman walked fifteen minutes a day and consumed between 2,000 and 2,500 calories a day, she would lose approximately ten pounds in a year. *See* Richard B. Parr, *Exercising When You're Overweight: Getting in Shape and Shedding Pounds*, 24 PHYSICIAN & SPORTS MEDICINE 81, 81 (1996).

35. *See* Maritz Research, *Let's Get Physical: More than Half of Americans Claim to Exercise Regularly at* http://www.maritzresearch.com/release.asp?rc=189&p=1&T=P (Feb. 2002) ("Income also plays a part in who chooses to exercise. Sixty percent of respondents making more than $45,000 per year exercise regularly, compared to 48 percent of those who earn less.").

Similarly, an increasing proportion of Americans has embraced sedentary lifestyles. Indeed, Americans now leave little time for exercise after spending most of the day sleeping, working, watching television or surfing the Internet—activities which generally expend few calories.[36] These lifestyles in part reflect a demanding society (for example, Americans work an average of nearly 2,000 hours per year),[37] and in part captivating leisure choices (for example, Americans spend an average of three hours per day surfing the Internet and four hours watching television).[38]

Perhaps not surprisingly then, most Americans encounter significant difficulty losing weight, thus further explaining obesity in America. As a matter of fact, it is estimated that more than 90% of those who diet gain back each pound they had lost.[39] Moreover, despite the apparent popularity of new diets, such as the "Atkins Diet" or the "South Beach Diet," Americans are actually dieting *less* frequently now than in the past, with the percentage of dieting Americans dropping from 20% to 16% between 1986 and 1996.[40] If this trend continues, twenty million Americans will be dieting in 2007, or four million fewer than in 1997.[41]

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36. *See generally* JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 151 (1991) (noting that such solutions run the risk of reproducing gender inequality unless women's roles change within the family); Scott D. Miller, *The Fair Labor Standards Act: Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMPLOYEE RTS. & EMPLOYER POL'Y J. 5 (2003) (examining and proposing amendments to the Fair Labor Standards Act).

37. Mortimer B. Zuckerman, *All Work and No Play*, U.S. NEWS & WORLD REP., Sept. 8, 2003, at 86; *see also* Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 280 (1995) (describing how the normal American work week has increased to the point where the average employee now works the equivalent of an additional month more than was worked in 1970).

38. *See* Charles Geraci, *Bush Camp Unveils Ads on Newspaper Web Sites*, EDITOR & PUBLISHER (May 24, 2004) (stating that American women spend 3.3 hours per day on the Internet), *at* http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1000517532; *see also* Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J.L. & TECH. 161, 190 n.81 (2003) (noting that the average American spends four hours a day watching television).

39. Joslin Diabetes Center, *supra* note 7.

40. Shannon Dortch, *America Weighs In*, 19 AM. DEMOGRAPHICS 39, 43 (1997). Along these lines, many weight loss and fitness companies are struggling financially. For instance, Weight Watchers International Inc. cut its 2003 profit forecast in August 2003; NutriSystem Inc. saw its revenue decline by 11% in the first nine months of last year; and Bally Total Fitness Holding Corp., owner of 420 health clubs, saw its membership revenue fall 7%, and its profits fall 84%, during the first nine months of 2003 when compared to the same period in 2002. Naomi Aoki, *No Carbs for You!*, BOSTON GLOBE, Jan. 11, 2004, at H1.

41. *See* Dortch, *supra* note 40, at 45.

Though most Americans expend little effort to consciously burn existing calories, many go to great lengths to add new ones. In truth, Americans are eating more than ever before. Specifically, the average caloric intake has risen 18% in the last thirty years,[42] representing roughly 530 additional calories per day.[43]

Part of the rise in caloric consumption pertains to food choice, as Americans have increasingly turned to food options outside the home, such as restaurant or diner food. In point of fact, Americans now spend half of their food budget and consume one-third of their daily energy on meals and drinks consumed outside the home, the latter figure representing an 80% increase from 1977.[44] On average, those foods contain more fat and fewer nutrients than food cooked at home.[45]

When Americans choose food outside the home, they most often select fast food, which offers the largest and most fattening servings.[46] Indeed, as it is often said, Americans love fast food.[47] More interestingly, it can also be said that the love affair only strengthens as the years pass. To illustrate, consider that fast food industry sales have grown from 25% to 50% of all restaurant sales since 1970.[48] Or,

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42. Ctrs. for Disease Control and Prevention, *Morbidity and Mortality Weekly Report: Trends in Intake of Energy and Macronutrients—United States, 1971-2000 at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5304a3.htm (Feb. 6, 2004) (noting that the average caloric intake reported by Americans rose from 1826 kilocalories per day from 1977 to 1978 to 1974 kilocalories per day from 1989 to 1991, and to 2002 kilocalories per day from 1994 to 1996); *see also* Dortch, *supra* note 40, at 41.

43. For a better sense of these figures, consider that 530 calories is roughly equivalent to 2.5 cups of cooked pasta. Christine Gorman, *How to Eat Smarter*, TIME, Oct. 20, 2003, at 52.

44. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 461 (1997); *see also* Putnam, *supra* note 33, at 3. A similar finding was observed by the Institute of Medicine in 1990, when it discovered that Americans expend roughly 43% of their food dollars on meals outside the home. Marlene Cimons, *Nutrition Labels for Fresh Foods, Restaurants Urged*, L.A. TIMES, Sept. 27, 1990, at A23 (quoting Professor Richard A. Merrill, chairman of the study conducted by the Institute of Medicine).

45. Nestle & Jacobson, *supra* note 7, at 19.

46. *See* John Burklow & Amy Aubertin, *Fast Food Chains Move Toward Healthier Choices*, 83 J. NAT'L CANCER INST. 325, 325 (1991) (noting that "[f]ast food represents the largest component of eating place sales, with expected sales of $74.1 billion in 1991"); *see also* Shanthy A. Bowman et al., *Effects of Fast-Food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey*, 113 PEDIATRICS 112, 112 (2004) (identifying fast food consumption among children as a factor in the expansion of obesity). *But see* TODD G. BUCHHOLZ, U.S. CHAMBER OF COMMERCE, BURGERS, FRIES AND LAWYERS: THE BEEF BEHIND OBESITY LAWSUITS 3 (2003) (concluding that there is "little conclusive evidence that [fast food] is a primary cause of obesity"), *available at* http://66.241.235.56/resources/burgers.pdf.

47. For a thorough account of the popularity of fast food in America, see generally ERIC SCHLOSSER, FAST FOOD NATION (2002).

48. Scott Allen, *The Greening of McDonald's: Environmental Houdini Act*

consider that Americans now spend $110 billion annually on fast food items,[49] compared with $50 billion spent on seafood,[50] and $60 billion spent on fruits and vegetables, combined.[51] Or, consider that 25% of Americans eat fast food daily,[52] and the average American consumes two fast food meals a week.[53] None of this should come as a surprise, however, since there are almost 250,000 fast food restaurants in the United States,[54] or roughly one for every 1,200 Americans.[55]

The growth of fast food consumption is also evidenced by the increase in advertising and promotional resources expended by the fast food industry.[56] In fact, it is estimated that the industry spends $33

Transforms Chain from Rogue to Role Model, BOSTON GLOBE, Jan. 24, 2000, at C1; *see also* Sahasporn Paeratakul et al., *Fast-Food Consumption Among US Adults and Children: Dietary and Nutrient Intake Profile*, 103 J. AM. DIETETIC ASS'N 1332, 1332 (noting that fast food sales increased 300% from 1970 to 1980).

49. Joel Iglesias, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 HOUS. L. REV. 1423, 1430 (2004).

50. FoodMarketExchange.com, *Shrimp Consumption: USA*, *at* http://www.foodmarketexchange.com/datacenter/product/seafood/shrimp/detail/dc_pi_sf_shrimp0701_01.htm (1999) (citing research conducted by the National Fisheries Institute).

51. *See* Press Release, Glad, Waste Watchers: What We Eat and What We Pitch (Nov. 2001) (citing research conducted by Dr. William Rathje that states "Americans spend $60 billion annually on fresh produce"), *available at* http://www.glad.com/media_9.html.

52. Davide Dukcevich, *Most Influential Businessmen: Ray Kroc*, *at* http://www.forbes.com/2004/03/15/cx_dd_mibp_0315krocpoll_print.html (Mar. 15, 2004).

53. Pamela Griner Leavy, *In a Hurry? Fast Food Can Fit into Your Diet*, ST. PETERSBURG TIMES, Feb. 10, 1999, at 4; *see also* Sharada Shankar & Ann Klassen, *Influences on Fruit and Vegetable Procurement and Consumption Among Urban African-American Public Housing Residents, and Potential Strategies for Intervention*, 13 FAM. ECON. & NUTRITION REV. 34 (2001) (presenting study which found that 55% of African-American families consume fast food each week). Anecdotally, consider that the per capita consumption of french fries now surpasses fresh potatoes, and that the average American consumes twice as much cheese as twenty years earlier. Dortch, *supra* note 40, at 42. Also, consider that "average annual consumption of cheese (excluding full-skim American and cottage, pot, and baker's cheeses) increased 269% between the 1950's and 1998." Putnam, *supra* note 33, at 7.

54. Bowman et al., *supra* note 46, at 112 (noting that as of January 2004, there were 247,115 fast food restaurants in the United States).

55. There were 290,809,777 Americans on July 1, 2003. Census Bureau, *supra* note 27. There are 247,115 fast food restaurants in the United States. Bowman et al., *supra* note 46, at 112. Thus, for each American, there are 1,177 fast food restaurants. To further illustrate this point, consider that most Americans live within three miles of a McDonald's. Allen, *supra* note 48, at C1.

56. The enlarged American food supply—which provides a daily average of 3,800 calories for every American, thus significantly exceeding the FDA's suggested intake range of 2,000 to 2,500 calories a day—likely contributes to intense competition among market participants of the fast food industry. *See* Anthony E. Gallo, *The Food Marketing System in 1996*, 743 U.S. DEP'T AGRIC. INFO. BULL. 1, 8-9 (1998).

billion annually on advertising, trade shows, supermarket slotting fees, incentives, and other consumer promotions.[57] In striking contrast, the National Cancer Institute outlays only $1 million per year to avail the benefits of fruits and vegetables,[58] while the National Heart, Lung, and Blood Institute's National Cholesterol Education Campaign possesses a seemingly meager budget of $1.5 million.[59] Perhaps most illustrative, "[o]nly 2% of all food advertising is devoted to the promotion of fruits, vegetables, grains, or beans."[60]

Fast food's remarkable currency with the American people has generated a number of explanations. For instance, fast food may provide a "self-medication" to those who are depressed, lonely or angry.[61] Fast food may also serve as a befitting companion to the burgeoning group of Americans who frequently watch television or surf the Internet.[62] Perhaps most practically, fast food offers a large amount of food for a very inexpensive price. Indeed, a recent study found that over 75% of fast food eaters "believe they're getting good value for their money."[63]

Aside from frequenting fast food restaurants more often, Americans are also eating more when they visit, particularly with the advent of "super sizing" and "value meals." In almost every fast food restaurant, a patron can opt for a value meal, which typically includes a hamburger sandwich, a side order of french fries, and a soft drink at a discounted price; in contrast, super sizing simply refers to enlarged versions of a regular dish. Roughly one-half of fast food orders are, in fact, value meals.[64] Sometimes super sizing and value meals are combined to produce a remarkably hearty meal. For instance, a McDonald's patron can purchase the "super-sized Big Mac value meal," which includes a

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57. Nestle & Jacobson, *supra* note 7, at 18.

58. *Id.* Moreover, the National Institutes of Health Five-A-Day Program, which promotes fruit and vegetable consumption, possesses a mere $3 million budget. Neal D. Barnard, *Big Food's Greasy Secrets*, N.J. L.J, Feb. 10, 2003, at 23.

59. *See* James I. Cleeman & Claude Lenfant, *The National Cholesterol Education Program: Progress and Prospects*, 280 JAMA 2099, 2102 (1998).

60. *See* Barnard, *supra* note 58, at 23.

61. *See* Joslin Diabetes Center, *supra* note 7. For an extensive analysis of the link between eating habits and depression, see Linda Jonides et al., *Management of Child and Adolescent Obesity: Psychological, Emotional, and Behavioral Assessment*, 110 PEDIATRICS 215 (2002). *See also* Mustillo et al., *supra* note 10 (providing study on link between youth, depression, and obesity).

62. *See* Joslin Diabetes Center, *supra* note 7; *see also* Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 221 (2004) (noting that Internet terminals have become available in fast food restaurants).

63. Allen, *supra* note 48, at C1 (citing study by the National Restaurant Association conducted in 2000).

64. *Id.*

hamburger sandwich, a large order of french fries, and a large soft drink. This meal contains 1430 calories and fifty-eight grams of fat.[65] To place these figures in perspective, the FDA, in the interests of reducing the risk of disease and maintaining good health, presently recommends that fat intake not exceed 30% of the total daily consumption of calories,[66] and that the average-sized person consume between 2,000 and 2,500 calories and sixty-five grams of fat *daily*.[67]

According to several market studies, Americans are uniquely attracted to value meals because they are obsessed with obtaining the largest portion size for their food dollar.[68] Moreover, for Americans on limited budgets, obtaining significantly more food in exchange for a minimal increase in price proves especially attractive.[69] This attraction

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65. McDonald's Corp., *McDonald's USA Nutrition Facts for Popular Menu Items*, *at* http://www.mcdonalds.com/app_controller.nutrition.categories.nutrition.index.html (last visited Nov. 17, 2004); *see also* McDonald's Corp., McDonald's Nutritional Information, *at* http://www.app.mcdonalds.com/bagamcmeal?process=flash (last visited Nov. 17, 2004) (allowing a consumer to calculate the total calories and fat for a Big Mac sandwich, large order of french fries, and large Cocoa-Cola Classic drink). Similarly plentiful, Burger King offers the Double Whopper with Cheese combo, containing two burgers on one bun, a medium order of fries, and a soft drink. For the Burger King patron who selects this option, he will receive the "value" of 1650 calories and eighty-seven grams of fat. Burger King Corp., *Burger King Nutritional Facts*, *at* http://www.burgerking.com/Food/Nutrition/NutritionWizard/index.aspx (last visited Nov. 17, 2004) (allowing a consumer to calculate the total calories and fat for a Double Whopper with Cheese, medium order of french fries, and medium Cocoa-Cola Classic drink).

66. Health Claims: Fruits and Vegetables and Cancer, 21 C.F.R. § 101.78 (2004). The FDA recently issued a guidebook on interpretation of the FDA's recommendations. *See* FDA, CTR. FOR FOOD SAFETY AND APPLIED NUTRITION, GUIDANCE ON HOW TO UNDERSTAND AND USE THE NUTRITION FACTS PANEL ON FOOD LABELS (2003), *available at* http://www.cfsan.fda.gov/~acrobat/foodlab.pdf.

67. *See* Nutrition Labeling of Food, 21 C.F.R. § 101.9(d)(9)(i)-(ii). The FDA has also promulgated instructions to synthesize the legislation. *See, e.g.*, Paula Kurtzweil, *'Daily Values' Encourage Healthy Diet*, 27 FDA CONSUMER 28, 31 (1993), *available at* http://www.fda.gov/fdac/special/foodlabel/dvs.html; Etta Saltos, *The Food-Pyramid Label Connection*, 27 FDA CONSUMER 17, 17-21 (1993), *available at* http://www.cfsan.fda.gov/~dms/fdpyrmid.html.

68. *See, e.g.*, Joslin Diabetes Center, *supra* note 7. Dr. Eleftheria Maratos-Flier of the Joslin Diabetes Center has stated: "People feel they have to eat a lot to get their money's worth. For an extra 5 cents, they want to upgrade to the larger size . . . [otherwise, they feel they are] getting ripped off." *Id.* Perhaps it is not surprising then that 67% of fast food patrons claim to finish their dish either most of the time or always, regardless of the amount served. *See* Barbara J. Rolls, *The Supersizing of America: Portion Size and the Obesity Epidemic*, 38 NUTRITION TODAY 42, 46 (2003).

69. *See* Joan Raymond, *The Need for Speed: What Consumers Really Want from Fast and Convenient Food*, 21 FORECAST 7, 7-8 (2001) (examining a study by the Food Marketing Institute that found fast food patrons are especially attracted to value meals in light of incremental increase in cost).

has certainly benefited the fast food industry, as almost every fast food menu now features an assortment of "value" options.[70]

As will be explored in this Article, however, while value meals may save individual customers "some change at the counter," they likewise exacerbate a national obesity epidemic, and cost taxpayers and employers billions of dollars in health care and lost productivity.[71]

D. Theory of Consumer Choice and Its Application to Food Selection

An obvious question regarding the link between fast food consumption and poor health pertains to consumer awareness of the food's content, and whether the consumer knowingly chooses to consume relatively unhealthy food. In one respect, fast food patrons appear largely cognizant that consumption of fast food may ultimately harm them: in a 1988 study, 60% of fast food patrons claimed that they were "worried" about the content of such food, and only 4% felt that its consumption was "good for them";[72] yet, since that time, fast food sales have only surged.[73] A 2003 study only echoes these findings, as 75% of American adults acknowledged "awareness that most fast food is not good for them."[74] Other studies conclude that most Americans willingly eat whatever pleases them, regardless of nutritional content,[75] and regardless of recognition that fat and cholesterol intake may lead to serious health problems.[76]

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70. One study, in fact, confirms that super sizing and value meals are uniquely profitable, as the ninety-nine cent large sandwich often lures customers, but those customers usually spend up to $3.99 more for the "value meal." *See* Nancy Kushner, *Don't Let Fast Food Weigh You Down*, PLAIN DEALER, May 24, 1999, at 1F (citing Dennis Lombardi, executive vice president of Technomic Inc., a food service consulting firm).

71. *See The Obesity Crisis in America: Hearing on Child Nutrition Programs Before the House Subcomm. on Educ. Reform of the House Comm. on Educ. and the Workforce*, 108th Cong. (2003) (statement of Richard H. Carmona, U.S. Surgeon General) ("While extra-value meals may save us some change at the counter, they're costing us billions of dollars in health care and lost productivity."), LEXIS, Federal Document Clearing House Congressional Testimony.

72. *See* Allen, *supra* note 48, at C1.

73. *See supra* Part I.C.

74. *See* Lydia Saad, *Public Balks at Obesity Lawsuits*, GALLUP POLL NEWS, July 21, 2003, *available at* http://www.gallup.com/content/login.aspx?ci=8869.

75. *See, e.g.*, Raymond, *supra* note 69, at 7 (highlighting research that fast food patrons tend to place little value in nutritional content); Dortch, *supra* note 40, at 45 (noting a statistical trend that Americans increasingly "eat whatever they want").

76. *See* Jayachandran N. Variyam, *Role of Demographics, Knowledge, and Attitudes*, *in* AMERICA'S EATING HABITS: CHANGES & CONSEQUENCES, 750 U.S. DEP'T AGRIC. INFO. BULL. 281, 287 (1999) (citing data that more Americans know that high fat and cholesterol intake may lead to health problems than not), *available at* http://www.ers.usda.gov/publications/aib750/aib750n.pdf.

Naturally, if fast food patrons perceive that they may become obese by eating fast food, and yet they still consume such food, it suggests that the product itself possesses certain undeterrable qualities. That is, such patrons may systematically underestimate the risks posed by the product.[77] Meaningfully, in such a setting, it is conceptually difficult for the law to provide consumers with incentives to take precautions, outside of prohibiting excessive activity levels, since those consumers internalize and accept the risk as part of the cost of using the product.[78] This type of consumer behavior is often associated with cigarette smokers, as despite prolific and remarkably dire warnings, a certain percentage of the adult population continues to regularly engage in such "risky" behavior.[79]

Unlike modern cigarette smokers, however, fast food patrons consistently underestimate the *extent to which* consumption of fast food may harm them, in part because they habitually discount the negative health contents of the food they eat. According to separate studies commissioned by New York University and the University of Mississippi, Americans tend to underestimate the caloric content of restaurant food by approximately 55%.[80] Additionally, with the proliferation of "super sizing" and enlarged portions, the gap between perception and reality of nutritional content only grows.[81] As a result, the typical fast food patron internalizes a degree of risk appreciably less significant than the actual risk present.

Another way of observing this systematic underestimation of risk is to consider that when individuals rely on false premises in purchasing

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77. *See* Hanson & Logue, *supra* note 23, at 1175–76 (explaining qualities that cannot be deterred in the context of cigarette consumption).

78. *Id.* at 1175.

79. It is acknowledged that a certain percentage of smokers may wish to quit but may be unable to due to the addictive qualities of nicotine. *Id.* at 1195–96.

80. MARGO G. WOOTAN, CTR. FOR SCI. IN THE PUB. INTEREST, ANYONE'S GUESS: THE NEED FOR NUTRITION LABELING OF FAST-FOOD AND OTHER CHAIN RESTAURANTS (2003) (noting that Americans underestimate the caloric content of restaurant steaks by 33%), *available at* http://www.cspinet.org/new/pdf/anyone_s_guess_final_web.pdf; *see also* William G. Johnson et al., *Dietary Restraint and Eating Behavior in the Natural Environment*, 15 ADDICTIVE BEHAVIORS 285, 285 (1990) (citing study by the University of Mississippi finding that restaurant patrons consistently underestimate caloric content); Peter Urban, *DeLauro Wants Fast Food Calorie Count*, CONN. POST, Nov. 6, 2003, at A1 (citing New York University study finding that nutritionists surveyed underestimated caloric content of a hamburger and onion rings at Applebee's by 44%). For an extensive explanation on the underestimation of calories in food, see Marion Nestle & Lisa R. Young, *Food Labels Consistently Underestimate the Actual Weights of Single-Serving Baked Products*, 95 J. AM. DIETETIC ASS'N 1150 (1995).

81. *See* Marion Nestle, *Increasing Portion Sizes in American Diets: More Calories, More Obesity*, 103 J. AM. DIETETIC ASS'N 39, 39–40 (2003).

fast food, they misinterpret the consequences and content of their selections, and thus fail to achieve maximum utility for their purchasing power. In other words, their supposedly rational decision to purchase fast food incorporates false premises, thus rendering their choice inherently uninformed. Accordingly, selection of fast food items may better reflect illusory characteristics than undeterrable qualities, thus begging the inquiry of whether reconstructed attitudes would yield identical consumption choices.

Consider this concept as applied to a typical fast food setting. For instance, assume a patron of Burger King decides to purchase and consume a "Double Whopper with Cheese" sandwich. This item contains 1070 calories. Assuming the consumer underestimates the item's caloric content by 55%, however, she believes it contains only 589 calories. Would she have purchased the item had she known its true caloric content? Or, does she exclusively value other prominent attributes associated with fast food (for example, its low price, and its quickly obtainable "great" taste), so that even had she been aware of its true caloric content, she would have made the same selection regardless?

Applying consumer choice theory to a consumer's methodology in purchasing food may help answer these questions, and also shed light on the link between nutritional labeling and fast food items. Consumer choice theory is a model of individual decision-making in a free market, and it assumes that individuals are able to rank the outcomes that result from their choices.[82] In ranking, individuals determine the relative utility of one choice over another, balanced against abilities and budgetary constraints, which attach a relative cost to each prospective choice. More systematically, then, individuals utilize a three-step process before making a decision,[83] and in the context of food choice, this Article posits the three-step process as follows: (1) *Food Consumption Preferences*—what food qualities (for example, taste or nutrition) are most important to the consumer in her selection of food, absent any external constraints (for example, price or availability)? (2) *Food Consumption Possibilities*—what food items are actually available to the consumer, given her income, the prices at which she must purchase the items, and accessibility to those items? (3) *The Intersection Between Food Preferences and Food Possibilities*—the point at which a consumer's food preferences intersect with her possible food

82. *See* Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1984 (2001) (applying emotions to the theory of consumer choice).

83. *See generally* JAMES R. BETTMAN, AN INFORMATION PROCESSING THEORY OF CONSUMER CHOICE 173-228 (1979) (analyzing the consumer's comparison process and the factors which influence the consumer's decision-making process). Typically, when products are difficult to differentiate according to other criteria, price becomes the superseding factor in consumer purchasing decisions. *See id.* at 181.

options explains why a consumer selects a particular food at a particular time.

Doubtless, food choices vary by individual; some consumers place a hypersensitive value on nutrition, and thus would never entertain the notion of eating fast food. Yet, how about consumers less dogmatic in their principles—those who value taste, nutrition, convenience, and price all to a significant and nonmutually exclusive extent? It stands to reason that these consumers' food choices *would* be affected by an erroneous belief in a particular chosen item's nutritional content, since it would affect how they prioritize their food consumption preferences.

As will now be explored, these phenomena are most intriguing in the context of childhood consumption of fast food, since, in this setting, parents often contemplate food choices for their young children, and parents are generally intolerant of health risk to their children. Indeed, parents place a higher premium on nutrition than taste in that decision-making model than they do when they select their own food items or those for other adults. Accordingly, it stands to reason that nutritional information may prove uniquely elucidative under such circumstances.

E. Childhood Obesity and Food Selection

Of all age cohorts, children are increasingly prone to becoming obese. This phenomenon is evident even among America's youngest, as 10% of children ages two to five are overweight, a statistic that has risen over 40% since 1994.[84] Similarly troubling, 15% of children ages six to eleven are overweight or obese, compared with only 7% in 1980 and 4% in 1970.[85] Older children tend to be even heavier, as over one in five teenagers are obese.[86] Other analyses suggest that children from

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84. Sandra S. Smith, *NCHS Dataline*, 117 PUB. HEALTH REP. 483, 483 (2002); *see also* Katherine Kaufer Christoffel & Adolfo Ariza, *The Epidemiology of Overweight in Children: Relevance for Clinical Care*, 101 PEDIATRICS 103, 103 (1998) (noting that from 1983 to 1995, the percentage of overweight one- to five-year-old children increased from about 19% to nearly 22%).

85. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH, UNITED STATES, 2003, at 234 (2003), *available at* www.cdc.gov/nchs/data/hus/hus03.pdf.

86. *See* Vicki Berends, *Prevalence of Fast Foods in California High Schools Threatens Teen Health*, BUS. WIRE, Feb. 16, 2000, LEXIS, News & Business, Wire Service Stories; *see also* Shumei S. Guo et al., *The Predictive Value of Childhood Body Mass Index Values for Overweight at Age 35 Years*, 59 AM. J. CLINICAL NUTRITION 810, 810–19 (1994) (presenting study which finds that child obesity continues into adulthood). Increasing obesity among children proves especially troubling for future trends, since eating preferences formed in childhood tend to persist in adulthood. *See* Leann L. Birch & Jennifer O. Fisher, *Development of Eating Behaviors Among Children and Adolescents*, 101 PEDIATRICS 539, 542 (Supp. 1998).

economically disadvantaged environments are particularly vulnerable to obesity, as fast food serves as an inexpensive meal option.[87]

Like their adult counterparts, obese children are progressively responsible for substantial medical expenses, much of which are absorbed by taxpayers. For instance, obesity-related hospital costs among six- to seventeen-year-olds rose from $35 million in 1979 to $127 million in 1999.[88] Only exacerbating these costs, 80% of children who become obese will remain so for the rest of their lives.[89] Aside from the physical costs of corpulence, obese children are frequently ridiculed at school, thus causing untold emotional damage.[90]

The growth in childhood obesity likely derives from myriad social phenomena. For example, children are less likely to play outside than in years past, with the average American child now spending more than three hours per day watching television and another four hours using the Internet or playing video games.[91] Moreover, children snack more often

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87. *See generally* Mustillo et al., *supra* note 10, at 851 (finding that children from minority and economically disadvantaged backgrounds are more susceptible to obesity); *see also* U.S. PREVENTIVE SERVS. TASK FORCE, GUIDE TO CLINICAL PREVENTIVE SERVICES 632 (2d ed. 1996) (noting that efforts to curb obesity must include programs that tailored to specific groups, sueh as pregnant women or low-income patients); Melinda S. Sothern & Stewart T. Gordon, *Prevention of Obesity in Young Children: A Critical Challenge for Medical Professionals*, 42 CLINICAL PEDIATRICS 101, 103 (2003) (presenting data that obesity among children is most prevalent in population groups dominated by low-income residents). To illustrate this trend, consider that in New York City, a recent study by the city's Department of Health and Mental Hygiene found that a staggering 24% of students were obese and 19% were overweight. *See* Press Release, New York City Department of Health and Mental Hygiene, Nearly Half of New York City's School Age Children are Overweight or Obese (July 8, 2003), *available at* http://www.ci.nyc.ny.us/html/doh/html/public/press03/pr075-0708.html.

88. H.R. Con. Res. 76, 108th Cong. (2003) (noting figures). Most children rely on public health insurance coverage. *See* Sandra S. Smith, *NCHS Dataline*, 118 PUB. HEALTH REP. 565, 565 (2003).

89. Approximately 80% of obese ten- to thirteen-year-old children will become obese adults. Sothern & Gordon, *supra* note 87, at 106. This dynamic was addressed by the U.S. Supreme Court in *Lorillard Tobacco Co. v. Reilly*, where Justice Clarence Thomas noted in his concurrence that "children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse." 533 U.S. 525, 588 (2001) (Thomas, J., concurring).

90. *See* Christopher B. Forrest et al., *Outcomes Research in Pediatric Settings: Recent Trends and Future Directions*, 111 PEDIATRICS 171, 176 (2003) (noting effect of childhood obesity on children's emotional well-being). Dr. Richard H. Carmona, the U.S. surgeon general has stated: "'Being overweight can cause a child deep and scarring emotional pain when peers and even parents ridicule or criticize.'" Alicia Ault, *Pediatricians Urged to Step Up Fight Against Obesity*, N.Y. TIMES, Nov. 4, 2003, at F10.

91. *See* AM. MED. ASS'N, PHYSICIAN GUIDE TO MEDIA VIOLENCE 8 (1996) (noting that children spend twenty-eight hours a week watching television); *see also* 150 CONG. REC. H1408 (2004) (statement of Rep. Osborne) ("The average child spends 6 hours a day watching television, playing with the computer or doing video games.").

than in the past, with snacks now accounting for 18% of the average child's energy intake, or 50% more than in 1994.[92]

Also explaining the surge in childhood obesity is the parallel surge in childhood consumption of fast food. According to a 2004 study conducted jointly by the American Academy of Pediatrics and Children's Hospital in Boston, such consumption among U.S. children ages four to nineteen has increased approximately 500% since 1970.[93] Along these lines, children who consume fast food could theoretically add, on average, six pounds to their weight per year, thus heightening their risk of obesity.[94] Similarly alarming, young adults who eat fast food more than twice a week are 86% more likely to become obese than are those who eat fast food less frequently.[95] Perhaps most illuminating, in any given month, 90% of American children between the ages of three and nine eat at a McDonald's restaurant.[96]

Children's growing consumption of fast food has unquestionably drawn the attention of the fast food industry. Indeed, as they are with many industries, children are the foremost advertising targets of fast food companies. In fact, food commercials account for more than 50% of television advertising aimed at children, translating to as many as three hours of food commercials each week.[97] Put differently, the average child in America observes at least 10,000 advertisements a year for food, 95% of which pertain to fast food, soda, candy, and sugar-fortified cereals.[98]

One study confirms the correlation between children partaking in sedentary activities and weight gain. Cara B. Ebbeling et al., *Childhood Obesity: Public-Health Crisis, Common Sense Cure*, 360 LANCET 473, 475 (2002). For additional comprehensive studies on children's time patterns, see Catherine S. Berkey et al., *One-Year Changes in Activity and in Inactivity Among 10- to 15-Year-Old Boys and Girls: Relationship to Change in Body Mass Index*, 111 PEDIATRICS 836 (2003); Steven L. Gortmaker et al., *Television Viewing as a Cause of Increasing Obesity Among Children in the United States, 1986–1990*, 150 ARCHIVES PEDIATRICS & ADOLESCENT MED. 356 (1996).

92. *See* Ebbeling et al., *supra* note 91, at 476.

93. Bowman et al., *supra* note 46, at 112.

94. *Id.* at 114.

95. *Id.*

96. Ellen Goodman, Opinion Editorial, *A Weighty Case Against Big Macs*, BOSTON GLOBE, Dec. 12, 2002, at A19.

97. Strategic Alliance, Action Brief: Unhealthy Marketing to Kids, *at* http://www.preventioninstitute.org/sa/pdf/SAAB_market.pdf (last visited Nov. 17, 2004). For an extensive study on the correlation between television viewing habits and children's health, see Renee Boynton-Jarrett et al., *Impact of Television Viewing Patterns on Fruit and Vegetable Consumption Among Adolescents*, 112 PEDIATRICS 1321 (2003).

98. Buck, *supra* note 15, at A1 (citing a study by the Yale Center for Eating and Weight Disorders).

Several factors illuminate why children are uniquely receptive to fast food advertisements. First, from a behavioral perspective, children are more trusting than adults, and, as a result, commercial messages tend to be viewed as advice from a friend.[99] Similarly, children under the age of five are generally unable to discriminate between programming and commercials, and children younger than eight are normally unskilled to discern a commercial's persuasive intent.[100] Perhaps for these reasons, fast food companies often employ expressive and warm mascots to pitch their food. McDonald's has likely been most successful in this regard, as 96% of American schoolchildren can identify Ronald McDonald, second only to Santa Claus in degree of recognition.[101]

Second, children represent the most lucrative purchasing cohort of any age group.[102] In fact, between their own spending and their influence on parental spending, children four- to twelve-years-old are responsible for approximately $600 billion a year in expenditures.[103] Moreover, in recent years, children's buying power has increased faster than any other age group.[104] Not surprisingly, therefore, fast food

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99. Angela J. Campbell, *Ads2Kids.com: Should Government Regulate Advertising to Children on the World Wide Web?*, 33 GONZ. L. REV. 311, 320 (1997–1998) (citing Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 11, 16 (1974)). The effect of television on children's subsequent behavioral patterns has been highlighted as a prime explanation for insufficient attention spans. *See generally* Dimitri A. Christakis et al., *Early Television Exposure and Subsequent Attentional Problems in Children*, 113 PEDIATRICS 708, 710 (2004) (reporting study testing correlation of early television exposure and poor attention spans).

100. Campbell, *supra* note 99, at 321.

101. *See* Strategic Alliance, *supra* note 97. One nutritional advocate even laments, "thousands of young children now think of burgers and chips every time they see a clown with orange hair [that is, Ronald McDonald]." Marlene Arnold Nicholson, *McLibel: A Case Study in British Defamation Law*, 18 WIS. INT'L L.J. 1, 139 (2000).

102. JAMES U. MCNEAL, KIDS AS CUSTOMERS: A HANDBOOK OF MARKETING TO CHILDREN 1–20 (1992); *see also* David Barboza, *If You Pitch It, They Will Eat It*, N.Y. TIMES, Aug. 3, 2003, § 3, at 1 (confirming continuing accuracy of McNeal's study). For an extensive study on consumerism and children, see Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 405–07 (2000).

103. *See* Barboza, *supra* note 102, § 3, at 1; *see also* Chris Reidy, *Chasing "Tweens": Reebok Joins the Race for the $10 Billion Spent by Americans Aged 7 Through 12*, BOSTON GLOBE, Mar. 2, 2003, at C1 (stating that, of the twenty million Americans who fall between the ages of seven and twelve, their collective allowance is $10 billion).

104. *See* Karen E. Rondon, *Innovations and Trends in the Electronic Toy Market*, at 10 (SRI Consulting, Bus. Intelligence Program, No. D96-2028, 1996), *available at* http://www.sric-bi.com/. "Spending by children is growing faster than that of any other demographic group. Children spend nearly $2.5 billion of their own money annually on toys and directly influence more than $17 billion in annual toy consumption." *Id.*

companies allocate most of their advertising and promotional budgets to the targeting of children.[105]

Third, and more specific to fast food advertising, children are especially valuable as future customers.[106] In point of fact, the University of Liverpool recently concluded that obese children are more receptive to fast food advertising on television than are normal-weight youngsters.[107] To attract and keep these children in their purchasing audience, fast food companies attempt to establish brand loyalty at an early age. In doing so, these companies routinely link children's toys to fast food meals.[108] A particularly impressive example of this phenomenon was Burger King's Teletubbies toy promotion in 2000, which is credited with doubling the company's sales to children that year.[109]

A recent report published in the *Journal of the American Dietetic Association* confirms the considerable effect of fast food advertising on children's eating patterns.[110] Specifically, when observing the eating patterns of children ages two through six, short-term preferences for

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105. Nicholson, *supra* note 101, at 139 (noting that McDonald's directs most of its $1.5 billion advertising and promotional budget toward children); *see also* Stuart Elliot, *McDonald's Campaign Aims to Regain the Youth Market*, N.Y. TIMES, Sept. 3, 2003, at C4.

106. *See* MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 25 (2002) (stating that candy, gum, and snacks constituted the largest category of new food products introduced in 1998 as a means to attract sales from children); Jane E. Brody, *Schools Teach 3 C's: Candy, Cookies and Chips*, N.Y. TIMES, Sept. 24, 2002, at F7 (quoting Nestle as writing, "[g]iven their purchasing power, numbers, potential as future customers and captive status, it is no wonder that food companies view schoolchildren as an unparalleled marketing opportunity").

107. Press Release, University of Liverpool, Obese Children More Receptive to Food Adverts, Say Psychologists (Oct. 16, 2003), *available at* http://liv.ac.uk/pro/news/press_releases/20030obcsitystudy.htm.

108. *See* Strategic Alliance, *supra* note 97. One expert has even stated that the "popular culture of our children has become indistinguishable from the fast-food culture." *See* Schlosser, *supra* note 47, at 48. McDonald's is the world's largest toy distributor. Sandra Eckstein, *Playing with Food*, ATLANTA J.-CONST., May 6, 2004, at NW6.

109. *See* Kath Dalmeny, *Food Marketing: The Role of Advertising in Child Health*, 13 CONSUMER POL'Y REV. 2, 3 (2003). Similarly, and more recently, McDonald's signed pop star Justin Timberlake to a $6 million endorsement contract, with the explicit expectation that Timberlake's popularity with children will boost sales. *See* Elliot, *supra* note 105, at C4.

110. *See* Dina L.G. Borzekowski & Thomas N. Robinson, *The 30-Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers*, 101 J. AM. DIETETIC ASS'N. 42, 42 (2001). In addition, "television viewing during mealtime is inversely associated with consumption of products not typically advertised, such as fruits and vegetables." *See* Ebbeling et al., *supra* note 91, at 475.

specific food products were significantly influenced by only one or two exposures to ten- to thirty-second food commercials.[111] Perhaps more importantly, members of the U.S. Supreme Court have recently identified such advertising as especially effectual. In *Lorillard Tobacco Co. v. Reilly*, Justice Clarence Thomas, in a concurring opinion, acknowledged that "there is considerable evidence that [fast food commercials] have been successful in changing children's eating behavior."[112]

Aside from traditional advertising venues, fast food companies routinely engage in direct, targeted contact with children. This materialization is most evidenced by the increasing prevalence of fast food restaurants on public school campuses. According to the CDC, approximately 20% of public schools in the United States now lease space to popular fast food companies.[113] School administrators often invite these companies to lease space because it provides budgetary supplements for other programs, such as team sports, marching band uniforms, and musical instruments.[114] Although federal dietary standards control school lunch programs, fast food items are typically sold separately, thus falling outside the scope of nutritional regulations.[115]

Fast food restaurants also access school campuses through "Channel One," a private venture that supplies schools with complimentary video equipment so that it can ostensibly broadcast news to students. Although students receive daily ten-minute news updates through Channel One, they are also required to view two minutes of commercials, and these commercials include fast food advertisements.[116] Approximately 8.3 million students in 12,000 public schools now watch Channel One.[117] Aside from Channel One, public school districts have

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111. Borzekowski & Robinson, *supra* note 110, at 45.

112. 533 U.S. at 588 (Thomas, J., concurring).

113. Dan Freedman, *Low Fat? The Kids Aren't Buying*, TIMES UNION, Sept. 22, 2002, at A1. In California, for instance, it is estimated that most school districts sell fast food, with Taco Bell, Subway, and Dominos Pizza ranking as the top brands sold. Berends, *supra* note 86. Joseph Hafey, president and chief executive officer of the Public Health Institute, a California-based nonprofit health organization, has remarked, "[f]ast foods on California campuses have become an epidemic." *Id.*

114. *See* Freedman, *supra* note 113, at AI.

115. Federal dietary standards for public school lunches are regulated by two legislative acts: School Lunch Programs, 42 U.S.C. §§ 1751-1769 (providing funds for public schools to provide "nutritious" school lunches); and Child Nutrition, 42 U.S.C. §§ 1771-1791 (2000) (setting standards for necessary nutrition of public school lunches).

116. Christina Lee Dasinger, *Students for Sale: The Regulation of Televised Commercial Advertising in Public Schools*, 20 L. & PSYCHOL. REV. 197, 197 (1996); *see also* Elizabeth Becker & Marian Burros, *Eat Your Vegetables? Only at a Few Schools*, N.Y. TIMES, Jan. 13, 2003, at AI (noting increased popularity of Channel One).

117. Brody, *supra* note 106, at F7. These figures represent at least 40% of all

begun resorting to billboard advertising on school buses and signs in school hallways as ways to generate revenue.[118] The Colorado Springs School District 11, for instance, generates approximately $150,000 a year through these types of sponsorships.[119]

The presence of the fast food industry on school campuses likely poses significant conflicts of interest for children's health. For one, in schools which lease space to fast food companies, the traditional, and U.S. Department of Agriculture (USDA) approved, cafeteria lunch options are coopted by generally better-tasting and less-healthy food choices. In fact, it is estimated that more than half of students in those schools opt for fast food lunches rather than either cafeteria selections or lunches brought from home.[120] Likewise concerning, the mere presence of fast food alternatives in school cafeterias may diminish the credibility of health education courses, as health instructors are expected to teach nutritional values in a setting that facilitates consumption of innutritious items.[121] Only making the job of health instructor more challenging is that physical education has declined rapidly in recent years, with the proportion of public schools offering such courses falling from 42% in 1991 to only 29% in 1999.[122]

Predictably, children appear increasingly likely to consume fast food upon encountering such substantial external influence on their food choices. Indeed, more so than other age groups, children are prone to take risks, weigh short-term consequences more heavily than long-term

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public schools. Hymel, *supra* note 102, at 408.

118. *See generally* Am. Acad. of Pediatrics, Comm. on Communications, *Children, Adolescents, and Advertising*, 95 PEDIATRICS 295 (1995) (presenting study by American Academy of Pediatrics on the influence of advertising in schools).

119. Jonathan Saltzman, *Taking Ads to School: Fiscal Crunch Has 2 Districts Selling Hot Display Space*, BOSTON GLOBE, June 8, 2003, at B9.

120. *See* Becker & Burros, *supra* note 116, at A14. Other studies confirm that fast food advertisements aired on Channel One "urge immediate self-indulgence" because observing students can then readily purchase those items at school. *See, e.g.*, Campbell, *supra* note 99, at 324 (citing Mark Crispin Miller, *How to Be Stupid: The Lessons of Channel One*, EXTRA!, May/June 1997, at 23); Nestle & Jacobson, *supra* note 7, at 18-21.

121. *See* Nestle & Jacobson, *supra* note 7, at 19.

122. *See* Nat'l Ctr. for Health Statistics, *NCHS Dataline*, 116 PUB. HEALTH REP. 273, 274 (2001). Also consider that most state governments have declined programs that would enhance children's awareness of the long-term consequences of obesity and overconsumption. *See generally* Nestle & Jacobson, *supra* note 7, at 19. On the other hand, note that California funds "Leaders Encouraging Activity and Nutrition" ("LEAN"), a program that trains high school students in nutrition, physical education, and advocacy. LEAN has been credited with preparing teen leaders to champion nutrition efforts amongst their peers. *See* Peggy Agron et al., *California Project LEAN's Food on the Run Program: An Evaluation of a High School-Based Student Advocacy Nutrition and Physical Activity Program*, 102 J. AM. DIETETIC ASS'N 103, 103 (2002).

consequences, and uncritically ascribe to advice or suggestion.[123] However, this trend of increasing consumption cannot be viewed in a vacuum, nor can the fast food industry be "blamed" without addressing every relevant actor. That is, when a child frequents fast food restaurants, is she often joined by a parent or guardian? If so, does she order her own meal, or does her parent or guardian place the order?

These questions are meaningful, since studies routinely find that parents possess substantial control over the types and amounts of food consumed by their children, particularly when those children are under the age of twelve.[124] Of perhaps greater societal interest, the food preferences of adults are predominantly shaped by their eating habits as children.[125] In other words, parents play perhaps the pivotal role in determining their children's weight for the rest of their lives. This is an especially material deduction when considering that parents tend to markedly underestimate the daily caloric intake of their children, most often in the absence of nutritional labeling.[126]

Since parents tend to influence or select a child's food choice, and since they tend to care significantly more about their children's nutrition than that of their own or that of other adults,[127] consumer choice theory

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123. *See* Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 657 (2003).

124. *See, e.g.*, Bowman et al., *supra* note 46, at 115–16 (finding that preteen fast food customers are influenced by parents in making selections or are told by parents as to which items to select); Susan L. Johnson, *Improving Preschoolers' Self-Regulation of Energy Intake*, 106 PEDIATRICS 1429, 1430 (2000) (concluding that parents tend to view decisions about children's eating as under their purview); Robert C. Klesges et al., *Parental Influence on Food Selection in Young Children and Its Relationships to Childhood Obesity*, 53 AM. J. CLINICAL NUTRITION 859, 861 (1991) (providing general study on the influence of parents on children's food selection); VA. DEP'T OF PUB. HEALTH, REPORT ON THE CHILD NUTRITION FOCUS GROUP PROJECT 1–3 (1998) (finding that parents often choose the meals for children when at home), *available at* http://www.vahealth.org/nutrition/sac/execsumm_698.pdf.

125. *See* Birch & Fisher, *supra* note 86, at 542–43; *see also* Robert L. Brent & Michael Weitzman, *The Pediatrician's Role and Responsibility in Educating Parents About Environmental Risks*, 113 PEDIATRICS 1167, 1169 (2004) (noting that humans tend to develop lifelong eating habits between the ages of one and four).

126. *See* Michael I. Goran, *Measurement Issues Related to Studies of Childhood Obesity: Assessment of Body Composition, Body Fat Distribution, Physical Activity, and Food Intake*, 101 PEDIATRICS 505, 512 (1998) ("[T]he inability of the parent to correctly appraise serving sizes, the degree of the perceived value of the food items [served], and the fact that children tend to better remember preferred foods as larger portions than nonpreferred foods augments [the difficulty to remember the caloric intake of the children].").

127. *See* Jordan D. Metzl et al., *Creatine Use Among Young Athletes*, 108 PEDIATRICS 421, 423 (2001) (concluding that parents are often receptive to information about optimum nutrition); *see also* Mary Frances Picciano et al., *Nutritional Guidance Is Needed During Dietary Transition in Early Childhood*, 106 PEDIATRICS 109, 112–13 (2000) (noting that parents often determine eating choices of children).

can query the assumptions and priorities of those parents upon selecting meals for their children. Indeed, by deduction, a typical parent selecting a child's meal *would* likely be affected by mistaken assumptions about a food's nutritional content, because in that consumption decision, the parent prioritizes nutrition ahead of both taste and price, and she internalizes a diminished toleration of risk.[128] Accordingly, enhancing the transmission of nutritional information in this limited instance appears worthy of further exploration. Moreover, since the food preferences of adults are predominantly shaped by their eating habits as children, this mode of analysis may impact macroeconomic fundaments, namely taxpayer absorption for the treatment of obesity and obesity-related illness, and the manner in which public resources are allocated.[129]

Also consider that insufficient or even misleading transmission of nutritional information, especially in the context of fast food consumption, has recently attracted the interest of the U.S. Supreme Court. In *Lorillard Tobacco*, Justice Thomas acknowledged in his concurrence the prevalence of fast food consumption, and its link to obesity and poor health: "[a]lthough the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods."[130] In doing so, Justice Thomas chose to contrast the similar marketing strategies employed by both the tobacco and fast food industries, particularly since tobacco use and fast food consumption are the two leading causes of preventable death in the United States.[131] As a result, one may deduce that the link between fast food consumption, inadequate information, and ill health has never been clearer. As shown in the next Part, however, federal lawmakers have avoided making this very link.

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128. *See, e.g.*, *Not All Fresh Foods are Created Equal, According to Consumers*, PR NEWSWIRE, Feb. 22, 1993 (reporting a study which found that nutrition is the most salient characteristic for choosing fruit); Francis Wardle & Nola Winegarner, *Nutrition and Head Start*, CHILDREN TODAY, Jan./Feb. 1992 (noting that parents recognize the importance of nutrition in responding to food requests by their children), *available at* http://www.findarticles.com/p/articles/mi_m1053/is_n1_v21/ai_13255502.

129. *Supra* Part I.B (discussing taxpayer absorption of obesity).

130. 533 U.S. at 587 (Thomas, J., concurring).

131. *Id.* at 587–88 (Thomas, J., concurring) ("Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly.").

II. LAWMAKING AND FAST FOOD LABELING: WHERE'S THE BEEF?

A. Federal Labeling Requirements Imposed on Commercial Food

As a way of warning Americans that heavy food consumption may lead to obesity, Congress passed the NLEA[132] to clarify and strengthen the FDA legal authority to require nutritional labeling on food.[133] Principally, the NLEA requires that food manufacturers provide nutritional labels for most items sold in retail food stores.[134] Along these lines, the NLEA was designed to embolden the FDA's legal authority to require nutritional labeling.[135] In terms of statutory development, the NLEA added two subsections—(q) and (r)—to section 403 of the Federal Food, Drug and Cosmetic Act ("FDCA"), thereby creating two new food-labeling provisions.[136] Section 403(q) specifies the general nutritional labeling standards and requirements, while section 403(r) limits the ability of food manufacturers to make unsubstantiated health claims.[137] Moreover, since the Secretary of the Department of Health and Human Services bears the ultimate responsibility for administering FDCA, and since the NLEA merely adds to the FDCA, the Secretary also possesses the ultimate responsibility for administering the NLEA.[138]

Following passage of the NLEA in 1990, the FDA issued labeling regulations specifically describing when a food label could employ the words "light," "low-calorie," and "low-fat" to describe a product.[139] These regulations also require that food manufacturers place the familiar "Nutrition Facts" graphic on the labels of all processed foods.[140] This graphic, which utilizes a uniform format, displays the amount per

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132. Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended at Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397).

133. H.R. REP. NO. 101-538, at 7 (1990); *see also* Marilyn J. Schramm, *Constitutional Protection of Commercial Speech Under the Central Hudson Test As Applied to Health Claims*, 51 FOOD & DRUG L.J. 323, 328 (1996). The NLEA sought "'to ensure that consumers have access to information about food that is scientifically valid, truthful, reliable, understandable and not misleading. *This information will enable consumers to make more healthful food choices.*'" Schramm, *supra*, at 328.

134. § 2, 104 Stat. at 2353.

135. *See* Arent v. Shalala, 70 F.3d 610, 619 (D.C. Cir. 1995) (reaffirming FDA's legal authority with respect to nutritional labeling).

136. § 2, 104 Stat. at 2353-57 (codified as amended at 21 U.S.C. § 343).

137. *Id.* at 2353-59.

138. *See* 21 U.S.C. § 371(a). The authority of the Secretary of the Department of Health and Human Services in this setting has been delegated to the Commissioner of Food and Drugs. 21 C.F.R. § 5.10(a)(1).

139. *See* 21 C.F.R. § 101.13. For an official explanation of the food labeling, see Marilynn Larkin, *Losing Weight Safely*, 30 FDA CONSUMER 16, 19-20 (1996).

140. 21 C.F.R. § 101.9(a)(1) (2004).

serving of calories, saturated fat, dietary fiber, and other nutrients.[141] It also provides "nutrient reference values," as expressed as "% Daily Values," which purportedly "help[s] consumers see how a food fits into an overall diet."[142]

To the dismay of many health advocates, however, restaurants are largely exempt from the NLEA. Generating the most controversy, restaurants are fully absolved of section 403(q), which created the new general nutritional labeling standards and requirements.[143] However, section 403(r), which restricts the ability of purveyors of food to present claims about a particular food's healthy nature, imposes that very limited restriction on restaurants.[144] Therefore, unless fast food companies affirmatively champion their food's healthy nature, the NLEA compels upon them no legal obligation to reveal their dishes' relatively high fat and caloric content.

By 1993, criticism of the NLEA's inability to affect the fast food industry reached new levels, as a number of fast food companies added "low fat" or "healthy" dishes to their menus without substantiating why those items were so healthy.[145] As a result, the FDA promulgated new regulations to require that those purportedly "healthy" menu items meet some, though not all, of the nutrition labeling requirements imposed on food sold in grocery stores.[146] Specifically, restaurants were ordered to change their menus' presentation of "healthy" items so that they were either "designed to meet the requirements for the claim because it was prepared using a recipe from a recognized health professional association or dietary group" or "the nutritional values for the dish were calculated using a reliable nutrition data base."[147] Restaurants were allotted ten months to make the requisite changes.[148]

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141. *Id.* § 101.9(d)(12)–(13).

142. *Id.*; FDA, THE FOOD LABEL (1999) [hereinafter FDA FOOD LABEL], *available at* http://www.fda.gov/opacom/backgrounders/foodlabel/newlabel.html.

143. 21 U.S.C. § 343(q)(5)(A)(i). As soon as the NLEA became law in 1990, criticism arose concerning the ability of fast food companies to evade its reach. For example, former New York Attorney General Robert Abrams referred to the NLEA insulation of fast food restaurants as "'inappropriate,'" reasoning "too many people regularly eat fast food to allow these phony health claims to proliferate unchecked." Karen Riley, *New York Won't Take Foods' Low-Fat Claims Lite-ly*, WASH. TIMES, Oct. 31, 1991, at C3. As will be discussed in Part III, New York became the first state to actively prod the fast food industry into divulging nutritional information.

144. 21 U.S.C. § 343(r)(5)(B).

145. *See generally* Louise Hildago, *Health Claims on Food Baffle the Shopper*, TIMES, Nov. 12, 1991, at 5 (detailing consumer uncertainty regarding nutritional claims of various food products).

146. *See* 21 C.F.R. § 101.65; *see also* Press Release, Food and Drug Administration, Menu Labeling (June 10, 1993) (providing the official explanation for the regulations), *available at* http://www.fda.gov/bbs/topics/news/new00410.html.

147. FDA, TALK PAPER: NUTRITION INFORMATION ON RESTAURANT MENUS (July

Despite its increased scrutiny of the restaurant industry, the FDA freely acknowledged that, "unlike processed foods, menu items bearing a claim are not held to the same strict standards of laboratory analyses."[149] In fact, initially under the NLEA, health claims for nonrestaurant foods and dietary supplements required FDA premarket approval, which was based on "the totality of publicly available scientific evidence . . . [that the claim is supported by] significant scientific agreement, among experts qualified by scientific training and experience."[150] Although the Food and Drug Administration Modernization Act of 1997 ("FDAMA")[151] removed the requirement of FDA approval, it still mandated that claims for nonrestaurant food be derived from "authoritative statements" of a scientific body.[152] In stark contrast, restaurants could rely instead on a recipe from any "recognizable health professional association" to establish their healthy menu items.[153]

To further illustrate the comparatively lax treatment of restaurants, the FDA, in establishing a sufficiency standard for a restaurant's "low fat" claims, utilized a mirror standard to that required by the NLEA for restaurant signs or placards containing nutritional or health claims: only those menu items containing nutritional content or health claims were subject to the NLEA, and only a "reasonable" explanation was mandated to explain how those claims fell within the statutory definitions. To exemplify "reasonableness," if a restaurant desired to place hearts on its menu as a way of indicating that certain dishes were low in fat, the restaurant would have to explain the meaning of the hearts, and offer specific information to support those claims.[154] Specific information could, for instance, refer to a low-fat recipe in an American Medical Association cookbook; alternatively, a simple

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30, 1996) [hereinafter FDA TALK PAPER], *available at* http://www.cfsan.fda.gov/~lrd/tpmenus.html.

148. *See id.*

149. *Id.*

150. 21 U.S.C. § 343(r)(3)(B)(i).

151. Pub. L. No. 105-115, 111 Stat. 2350, 2351 (1997) (amending 21 U.S.C. § 343(r)(3)).

152. However, those claims still must be authorized by the FDA, and must demonstrate that they are based on an "authoritative statement" of a scientific body. *Id.* at 2350–51. For a discussion on the parameters of an "authoritative statement," see Ilene Ringel Heller, *Functional Foods: Regulatory and Marketing Developments*, 56 FOOD & DRUG L.J. 197, 200–01 (2001).

153. FDA TALK PAPER, *supra* note 147.

154. *See* Marian Burros, *U.S. Wants to Keep Menus Honest on Nutrition Claims*, N.Y. TIMES, June 10, 1993, at A1 [hereinafter Burros, *Nutrition Claims*].

notation that the item derived from lean meat or a similar ingredient could suffice.[155]

The 1993 regulations also supplied restaurants with considerable flexibility in formulating delivery of their foods' nutritional information.[156] Replicating its requirement of claim explanation, the FDA required only "reasonableness" on the part of restaurants when informing consumers of their dishes' content.[157] Notably, reasonableness did not oblige restaurants to employ the widely identifiable "Nutrition Facts" format required on packaged food labels.[158] Instead, restaurants were accorded wide latitude in satisfying sufficient "reasonableness," including the FDA's stated allowance that "restaurants should be able to make their own determinations" as to the explanation of an item's nutrition.[159]

Despite the considerably limited scope of the 1993 regulations, the National Restaurant Association maintained that restaurants would be saddled with excessive menu revision costs.[160] Importantly, however, if restaurants did not avail the healthiness or low-fat nature of their food, they could continue to shield those foods from nutritional disclosure. This arrangement continues to this day.[161] Simply put, if a restaurant menu item fails to advocate promotion of good health, the restaurant bears no obligation to divulge that item's nutritional content—even upon customer request.[162] Since most restaurant items are not promoted as

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155. *See id.*

156. *See* FDA TALK PAPER, *supra* note 147.

157. *Id.*

158. *Id.* To respond to ambiguity regarding the "reasonable" standard of delivery, the FDA published 2 FOOD LABELING QUESTIONS AND ANSWERS: A GUIDE FOR RESTAURANTS AND OTHER RETAIL ESTABLISHMENTS (1995) [hereinafter FDA RESTAURANT GUIDE], available at http://vm.cfsan.fda.gov/~dms/guidance.html#lab. This book was made available at no cost through the FDA.

159. *See* FDA RESTAURANT GUIDE, *supra* note 158.

160. *See* Burros, *Nutrition Claims*, *supra* note 154, at A1.

161. Note that in 1995, a number of public health advocates sued the FDA in order to confirm that the NLEA applied to restaurant menus, rather than merely placards and posters. In *Public Citizen, Inc. v. Shalala*, 932 F. Supp. 13 (D.D.C. 1996), the U.S. District Court for the District of Columbia affirmed that the NLEA could regulate restaurant menus, provided that those menus championed the health advantages of their food. *Id.* at 17. Most significantly, the court found that "[the NLEA] governs all nutrition and health claims made in the labeling of food and expressly details the extent of restaurant coverage." *Id.* at 16 (citing 21 U.S.C. § 343(r)(1), (r)(5)(B)).

162. This rather significant loophole has drawn the attention of the FDA. *See* Letter from Kristy Moran, Food and Drug Administration Executive Secretariat, to Deborah J. Alexander 1-2 (Aug. 31, 2001) [hereinafter Letter from Kristy Moran] (noting that the FDA encourages ingredient labeling of restaurant foods), *available at* http://www.fda.gov/ohrms/dockets/dailys/01/Sep01/090701/ans0006.pdf. It has also been highlighted by the media. *See, e.g.*, Sally Squires, *Eating Right*, WASH. POST, Jan. 1, 2002, at F5 (noting that only *some* fast food restaurants offer nutritional

such, this narrow exception has scarcely impacted the restaurant industry.

The FDA recently reaffirmed its position to exempt restaurants from labeling obligations. In a letter dated August 31, 2001, the FDA Executive Secretariat Kristy Moran stated:

> [W]e believe that it may be feasible for certain types of restaurants (e.g. chain or fast food restaurants with standardized food preparation and ingredient specifications) to provide ingredient information. *However, at this time, the agency does not have enough information about the industry to determine the appropriateness and manner of requiring ingredient labeling by restaurants.*[163]

Although this statement applies to ingredient, rather than nutritional, information, it nevertheless illuminates the regulatory constraints imposed upon the FDA in promulgating labeling regulations. Indeed, the FDA presently champions "declarations on a voluntary basis."[164]

B. Examining the Labeling Exemption for Restaurants

The merits of the labeling exemption for restaurants proves worthy of exploration, particularly since the strength of such merits may fluctuate by restaurant type. This Section will discuss the five most heralded rationales for the exemption, and evaluate them in the larger context of nutritional notification and consumer choice.

First, the restaurant industry often scorns the costs of legislatively compelled menu modification, claiming that expenses inherent in promulgating new menus increase the cost of doing business.[165] In the context of the NLEA, however, such expenses have likely proven minimal, since the NLEA only requires nutritional information for those restaurant items claiming to promote good health.[166] Moreover, even if restaurants were compelled to fully comply with the NLEA, sunk costs

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information upon request).

163. Letter from Kristy Moran, *supra* note 162, at 1-2 (emphasis added).

164. *Id.* at 2. On the other hand, the FDA has no statutory authority under the NLEA to mandate nutritional disclosure by the fast food industry, so its reluctance may be explained simply by its lack of authority. *See supra* Part II.A.

165. *See* Cimons, *supra* note 44, at A23 (citing comments by Michael E. Hurst, president of the National Restaurant Association); *see also* Press Release, Coalition for California Jobs, Job Killer Bills 2003 4 (May 29, 2003) (arguing that menu modification would prove costly and thus make it more difficult to employ workers), *available at* http://www.cajobsfirst.org/pdf/jobkillerlist_052803.pdf.

166. *See* 21 U.S.C. § 343(q)(5)(A)(i).

would already encompass most, if not all, expenses inherent in compliance, as menus are routinely modified for business reasons, such as price increases, meal alterations, and item additions.[167]

A second and related refrain pertains to space: menus, including drive-through displays, are limited in size, and nutritional information may therefore prove difficult to display.[168] One possible remedy to this concern would be for restaurants to post nutritional information on every table or, in the case of fast food restaurants, on the cartons of fast food items, similar to the nutritional information posted on the cartons of packaged foods sold in grocery stores. Yet, in that arrangement, nutritional information would be furnished *after* the point of sale, unlike nutritional information found on packaged groceries. Considering that the U.S. Federal Trade Commission (FTC) finds that 70% of food shoppers in grocery stores make their purchase decisions at "the point at which [they] are being directly exposed to label information," the value of providing nutritional information after the point of sale appears insufficient.[169]

Alternatively, some fast food restaurants now post nutritional information on their websites, such as http://www.mcdonalds.com or http://www.burgerking.com. Two factors, however, diminish the content. First, as many as 42% of Americans remain without Internet access, and those with modest amounts of income and education, those most in need of nutritional information,[170] are significantly "less wired" than those in higher income brackets or those with college degrees.[171] Second, such online nutritional information often proves obtuse or incomplete. For instance, on Burger King's website, aggregate caloric content and fat content are listed for each menu item, yet, unlike the nutrition facts format dictated by the NLEA, the reader does not learn of

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167. *See* 21 C.F.R. § 101.10.

168. Steven C. Anderson, president of the National Restaurant Association, insists, "I just don't see the practicality of it. I don't know how you'd do that." Margaret Webb Pressler, *A Super-Size Backlash: Restaurant Menus Feature More with Less*, WASH. POST, Aug. 6, 2003, at E1.

169. *See* FDA, IN THE MATTER OF OBESITY WORKING GROUP 7 n.14 (Dec. 12, 2003), *available at* http://www.ftc.gov/be/v040003text.pdf; *see also* Pressler, *supra* note 168, at E4 (noting that at the point of sale a consumer observes information at the most accessible and most important point). On the other hand, the value of on-table or on-carton labeling may be greater for repeat customers than for new customers, since they would repeatedly encounter those labels.

170. Studies have identified a correlation between wealth and obesity. *See, e.g.*, OFFICE OF THE SURGEON GEN., *supra* note 22, at 13–14; Bobinski, *supra* note 30, at 379.

171. Press Release, Pew Internet & American Life Project, The Shifting Internet Population Recasts the Digital Divide Debate (Apr. 16, 2003), *at* http://www.pewinternet.org/ppf/r/62/press_release.asp.

the daily nutritional percentage that such content comprises. As a result, while a reader may observe that a "Double Whopper with Cheese" sandwich contains sixty-nine grams of saturated fat, she does not observe that consuming sixty-nine grams of saturated fat would provide approximately *110%* of her suggested daily intake of saturated fat.[172]

A third rationale pertains to restaurants' tendency to purchase fresh food, which sometimes varies by season, meaning that menu items can often fluctuate in size and caloric content depending upon the availability of quality ingredients.[173] As a result, restaurant menus would potentially require frequent and cumbersome changes to satisfy the NLEA. This concern, however, seems inapplicable to fast food items, since those items are standardized, just like processed foods found in grocery stores. If anything, fast food is remarkable for enabling customers to receive the same product no matter which store they visit, or what season they visit it in.[174]

A fourth, and perhaps more plausible concern for fast food companies, is that their ingredients are protected creations, and, if divulged, could be copied. For instance, during the early 1980s, when a McDonald's customer requested ingredient information, the customer would usually receive a letter stating, "'I hope you understand, in a business such as ours, why we cannot release complete ingredient lists.'"[175] Revealing nutritional information, however, seems far less "protective" than revealing ingredients. To illustrate this point, consider that Coca-Cola Inc., in adherence to the NLEA, openly divulges the nutritional information for its Coca-Cola soft drink, despite

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172. *See* Burger King Corp., *supra* note 65.

173. For example, if a restaurant chef does not have fresh tomatoes at her disposal, she would probably not use tomatoes in making a sandwich, thus affecting the sandwich's caloric and nutritional content. *See* Cimons, *supra* note 44, at A23. Also consider comments by Dick Grotton, executive vice president of the Maine Restaurant Association:

> They're asking us to provide something that is impossible [because] . . . portion sizes can change. You will end up with widely varying information as far as calorie content, sugar, and sodium is concerned. And what happens if the truck arrives at five [o'clock] and all they have is another type of ice cream? Suddenly, the calorie count is not the same as posted. We have an accuracy issue here.

Paul Frumkin, *States Launch Efforts to Require Chains' Posting of Nutrition Facts*, NATION'S RESTAURANT NEWS, Mar. 24, 2003, at 1, 77.

174. In *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (2003) ("*Pelman I*"), Judge Robert W. Sweet observed this very point: "[a McDonald's] Big Mac is the same at every outlet in the Bronx, New York; the same at every outlet in the State of New York; and the same at every outlet throughout the United States." *Id.* at 523.

175. Marian Burros, *De Gustibus: Soon You'll Know What's in a Burger*, N.Y. TIMES, May 17, 1986, at 32 [hereinafter Burros, *De Gustibus*].

the fact that it has long guarded the "secret" ingredient formula triggering the product's popular taste.[176]

Lastly, fast food companies contend that the "Nutrition Facts" graphic itself has proven woefully ineffective in communicating dietary choices for consumers, and that it would prove similarly ineffective when used in the restaurant context. Perhaps the most controversial component of the graphic is the "standardized serving size" which purportedly facilitates making nutritional comparison of similar products. The NLEA defines serving size "as the amount of food customarily eaten at one time,"[177] and its implementing regulations supply manufacturers with serving sizes for particular products or food categories.[178] As a source of some confusion, however, similar food products are occasionally allotted disparate serving sizes, thus making nutritional comparison between products challenging. For instance, while one serving size of such items as donuts and pastries is measured at fifty-five grams, one serving size of popcorn and pretzels is measured at thirty grams.[179] Even identical products in different sizes can present perception problems. For example, a twelve-ounce can of Coca-Cola contains 140 calories and is considered a single serving, yet a twenty-ounce bottle of Coca-Cola contains 330 calories and lists 100 calories as a single serving.[180] As a result, certain consumers may not readily observe differences in serving size between similar or identical products, and they may thus consume more calories than desired.[181]

Despite the limitations of the nutrition facts format, consumer choice appears enhanced by observation of nutritional content; criticism of the format often fails to consider that an imperfect format generally proves superior to no format at all.[182] This is particularly meaningful since consumers routinely underestimate calorie counts of the food they

176. *See generally* FREDERICK ALLEN, SECRET FORMULA (1994) (discussing the success and secrecy of the Coca-Cola formula).

177. FDA FOOD LABEL, *supra* note 142.

178. *See generally* 21 C.F.R. § 101.12.

179. *Id.* § 101.12(b).

180. Sherri Day, *The Smoke and Mirrors of Food Labeling*, N.Y. TIMES, Nov. 15, 2003, at C1.

181. *See* T.R. Smith & A.M. Smith, *Effectiveness of an Instructional Videotape on Ability to Estimate Food Portion Sizes*, 101 J. AM. DIETETIC ASS'N 982, A-98 (Supp. 1 2001). For this reason, in December 2003, the Federal Trade Commission (FTC) recommended to the FDA that serving sizes be revisited because they "may significantly understate the amount of particular foods and calories that people typically consume." Press Release, Federal Trade Commission, FTC Staff Weighs in on Food Labels and Obesity (Dec. 15, 2003), *available at* http://www.ftc.gov/opa/2003/12/fdaobesity.htm.

182. For example, consider how scientific researchers regard an imperfect format for accumulating epidemiological data as preferable to no format. *See* Gyles R. Glover et al., *Is the Money Following the Clients with Learning Disabilities?*, 306 BRIT. MED. J. 987, 987 (1993).

order.[183] Moreover, according to one study, most consumers regard the nutrition facts format as highly effective: 90%, in fact, believe the format "makes it easier to tell if a food is high or low in fat," while 70% regard it as "more clear and understandable" than previous (and manufacturer-varied) incarnations of nutrition facts.[184] Equally important, to the extent the format is indeed flawed, the FDA is currently considering methods to enhance it.[185]

C. Inefficiencies in Promulgating Labeling Laws and Regulations

Although its opposition to divulging nutritional information may not clearly validate its exemption from labeling requirements, the restaurant industry has nonetheless effectively lobbied Congress. Along these lines, advocates of campaign finance reform contend that such preferred treatment can be attributed to substantial campaign contributions. According to the Center for Public Integrity, the fast food industry has proven especially generous in this regard, having contributed more than $41 million to congressional and senatorial races from 1988 to 1998.[186] McDonald's, the largest fast food corporation, alone supplied $1.7 million to congressional races during this time.[187]

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183. *See supra* Part I.D.

184. *See* Sheldon Margen & Dale A. Ogar, *Assessing New Labels*, RECORD Sept. 28, 1994, at C1 (citing a 1994 study conducted by *Prevention Magazine*, which also found that 67% of people "believed the format has helped to improve their diets" and 54% felt that reading the format changed a decision to buy or use a food at least once a month); *see also* ALAN S. LEVY & BRENDA M. DERBY, FDA, THE IMPACT OF THE NLEA ON CONSUMERS: RECENT FINDINGS FROM FDA'S FOOD LABEL AND NUTRITION TRACKING SYSTEM (1996) (reporting that 48% of people find that nutrition information on food labels causes them to change their minds about buying a food product), *available at* http://vm.cfsan.fda.gov/~dms/hclm-rpt.html.

185. *See FTC: Serving-Size Labels May Mislead*, PHILA. INQUIRER, Dec. 22, 2003, at F3. The FDA has opened such discussions to the public as well. Nutrition Subcommittee of the Food Advisory Committee; Notice of Meeting, 69 Fed. Reg. 16,275 (Mar. 29, 2004).

186. CTR. FOR PUB. INTEGRITY, SAFETY LAST: THE POLITICS OF E. COLI AND OTHER FOOD-BORNE KILLERS 2 (1998), *available at* http://www.publicintegrity.org/dtaweb/downloads/safetylast.pdf.

187. *Id.* at 78. However, contributions by the restaurant industry should be placed in context. For instance, in the 2002 federal election cycle, trial attorneys out contributed McDonald's by a ratio of forty-five to one. *Personal Responsibility in Consumption Act: Hearing on H.R. 339 Before the House Comm. on the Judiciary*, 108th Cong. 6-7 (2003) (statement of Rep. Ric Keller, Member, House Comm. on the Judiciary). Moreover, fast food and other restaurants most often contributed to the campaigns of Congress's top leaders, including Newt Gingrich, Trent Lott, Richard Gephardt, and Tom Daschle. CTR. FOR PUB. INTEGRITY, *supra* note 186, at 2. Dan Glickman, former Secretary of Agriculture under President Clinton, likewise received substantial contributions while he served as a congressman from Kansas. *Id.*

Recent political activity appears perhaps even more illustrative of the link between preferential treatment and campaign contributions. Consider that during the 2000, 2002, and 2004 election cycles, food and beverage companies have, to date, contributed $170,000 to the campaign committee of U.S. Representative Ric Keller (R-FL).[188] Keller happens to be the lead author of the recently introduced "Personal Responsibility in Food Consumption Act,"[189] a bill that would significantly shield fast food companies from tort liability.[190] Similarly, U.S. Senator Mitch McConnell (R-KY), who introduced the Senate version of Representative Keller's Act, received $200,000 in contributions from the food and beverage industry in 2002 alone.[191]

Aside from lobbying efforts, Congress has perhaps also been motivated by concerns that regulating fast food menus would adversely affect the sale of fast food, which, in turn, would adversely affect other industries. In other words, if Americans consumed less fast food, then sports arenas, shopping malls, and even public schools would lose revenue, because those industries frequently lease space to fast food companies.[192] Along these lines, campaign finance reformists believe that Congress has purposefully avoided initiating effective programs to counter overeating in the United States. To illustrate, consider that the 1977 Senate report on diet and chronic disease prevention, *Dietary Goals for the United States*, remarkably omitted mention of the word "obesity" and instead heralded such obtuse recommendations as reducing "energy intake" and raising "energy expenditure."[193]

Conflicts within executive agencies may also explain the absence of momentum to require labeling of restaurant food. For instance, according to Marion Nestle, chair of the Department of Nutrition and Food Studies at New York University, the USDA is "plagued by conflicting missions—to promote consumption of American food

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188. Tamara Lytle, *We're Just Too Darn Fat; Obesity Rivals Tobacco as Top Preventable Killer in U.S.*, ORLANDO SENTINEL, Mar. 10, 2004, at A1.

189. H.R. 339. The Senate counterpart is the Commonsense Consumption Act, S. 1428, 108th Cong. (2003).

190. Specifically, the Personal Responsibility in Food Consumption Act would bar claims against fast food companies for any damages resulting from patrons' obesity. H.R. 339. Regarding the contributions to U.S. Representative Ric Keller, he received the fifth largest amount in Congress from this industry for the 2004 election. Lytle, *supra* note 188, at A1.

191. *McConnell Seeks to Protect Industry Against Fat Lawsuits*, CONGRESSDAILY, July 16, 2003, at 10.

192. *See* Marion Nestle, *Industry, Bureaucrats Stall Fight Against Fat*, TIMES-PICAYUNE, July 10, 2000, at B7.

193. *See* SELECT COMM. ON NUTRITION & HUMAN NEEDS, U.S. SENATE, DIETARY GOALS FOR THE UNITED STATES XXXIII–XXXV, at 4 (2d ed. 1977); *see also* Nestle & Jacobson, *supra* note 7, at 15 (examining weaknesses of the 1977 report).

products and to advise the public about diet and health."[194] Since fast food companies have effectively persuaded the USDA, Professor Nestle contends that federal antiobesity campaigns to emphasize health have offered only "bland precepts" that focus on "individual food choices, not food marketing practices."[195] Moreover, these campaigns typically extol abstract virtues of "balance, variety, and moderation," and encourage tritely worded "partnerships and alliances," rather than simply promote reduced consumption of fattening food.[196]

To demonstrate the institutional ambivalence of the USDA, consider the National Nutrition Summit, which was hosted by the USDA, along with several other federal agencies, in May of 2000.[197] As part of the Summit's preparation, draft guidelines were developed on a number of topics, one of which was sugar intake.[198] In September 1999, the draft guidelines stated, "'[g]o easy on beverages and foods high in added sugars.'"[199] After complaints by the sugar industry, however, the February 2000 draft stated, "'[c]hoose beverages and foods that limit your intake of sugars.'"[200] Finally, when the Summit announced its publishable set of guidelines, Americans were told to "'[c]hoose beverages and foods to moderate your intake of sugars.'"[201] In other words, after nine months, the phrase "'go easy,'" and the words, "'added'" and "'limit,'" were all removed.[202]

Not surprisingly then, research suggests that consumers often feel overwhelmed and frustrated by government-procured messages pertaining to diet and health. In fact, according to a recent study, 40% of respondents strongly agreed with the statement, "[t]here are so many recommendations about healthy ways to eat, it's hard to know what to

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194. Nestle, *supra* note 192, at B7. For a historical account of conflict within the U.S. Department of Agriculture (USDA), see generally JEAN MAYER, U.S. NUTRITION POLICIES IN THE SEVENTIES (1973) (noting the conflict of interest that exists within the USDA).

195. Nestle, *supra* note 192, at B7.

196. *Id.* For these reasons, Professor Nestle contends, "[t]hat's why our government has never supported a campaign to prevent obesity." *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* For another recent example, consider that the Department of Health and Human Services recently issued a ten-year Healthy People 2010 Plan, which emphasizes regular exercise and avoiding fatty foods. But, as noted by Nestle and Jacobson, "the plan offers little guidance as to how the objectives are expected to be achieved beyond calling for 'a concerted public effort' in that direction." *See* Nestle & Jacobson, *supra* note 7, at 16 (quoting U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2 HEALTHY PEOPLE 2010, at 19–25 (2d ed. 2000), *available at* http://www.healthypeople.gov/Document/tableofcontents.htm#volume2).

believe."[203] As will be explored in the following Part, such equivocal federal policy has motivated other governmental actors to take matters of nutritional disclosure into their own hands.

III. VOLUNTARY CONCESSIONS: ASSESSING FREE MARKET INCENTIVES

A. New York Reforms

While the federal government has largely exempted fast food restaurants from duties to divulge their food's nutritional content,[204] the State of New York, and, in particular, the City of New York, have attempted to fill the gap through coercing voluntary agreements with fast food companies. The State of New York has one of the highest rates of childhood obesity, as 20% of the state's children ages six to nineteen are overweight.[205] As a result, New York policymakers have viewed voluntary agreements as methods to potentially amplify disclosure of fast food's contents beyond existing legal requirements. From an analytical standpoint, such agreements prove worthy of exploration, particularly if market incentives may more efficiently promote nutritional objectives than would enhanced legislative mandates.

New York began its efforts in 1986, when Attorney General Robert Abrams, along with the Attorneys General of Texas and California, reached an agreement with five fast food companies that required them to supply nutritional brochures and posters in their franchises ("1986 Agreement").[206] The attorneys general held leverage in this instance, as Senator John H. Chafee (R-RI) had recently introduced the Fast Food Ingredient Act of 1986 ("FFIA"),[207] federal legislation that would have required all fast food restaurants to make ingredient labeling and nutritional information available to consumers.[208] Once the 1986

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203. Jayachandran N. Variyam & Elise Golan, *New Health Information Is Reshaping Food Choices*, 25 FOODREVIEW 13, 21 (2002).

204. *See supra* Part II.A.

205. *See* Duggan, *supra* note 23, at A1; *see also* Press Release, Council of the City of New York, Council Members Quinn and Moskowitz Hear Testimony on Nutrition in City Schools (June 24, 2003) (noting the surge of childhood obesity in New York and contending that lawmakers have often ignored remedies), *available at* http://www.nyccouncil.info/pdf_files/newswire/junkfood.pdf.

206. *New York City and Burger King Announce Unique Agreement for Nutrition Disclosure*, PR NEWSWIRE, Aug. 7, 1991 [hereinafter *Unique Agreement*]. Those companies were Burger King, McDonald's, Kentucky Fried Chicken, Wendy's, and Roy Rogers. *See* Burros, *De Gustibus*, *supra* note 175, at 32.

207. S. 2446, 99th Cong. (1986).

208. *Id.*; *see also* 132 CONG. REC. 10,420 (1986) (statement of Sen. Chafee).

Agreement was reached, however, momentum behind FFIA dissipated.[209]

Although innovative, the 1986 Agreement failed on two levels. First, fast food companies typically packaged their "nutritional brochures" with substantial, and often distracting promotional information.[210] Second, by 1990, less than half of New York City's Burger King restaurants offered the brochures, and none contained the posters.[211] As a simple matter, the agreement was not enforced, and therefore proved ineffective.

In 1991, New York attempted once again to compel fast food restaurants into voluntarily revealing their food's nutritional information. Specifically, Abrams compelled both Kentucky Fried Chicken and Dunkin' Donuts to desist from airing television advertisements that falsely characterized certain products as "healthy."[212] To illustrate, consider that Kentucky Fried Chicken introduced a "Lite'n Crispy" chicken that comprised nearly the same caloric content as the company's "Original Recipe" chicken.[213] However, the Lite'n Crispy chicken was advertised as giving "weight watchers a new food option."[214] Similarly misleading, Dunkin' Donuts marketed their "0% Cholesterol" donuts as promoting good health, emphasizing that these donuts were 90% free of saturated fat.[215] Yet because of unsaturated fat content, the "0% Cholesterol" donuts contained approximately the same percentage of fat as the company's regular donuts.[216]

In response to persistent demands from the New York Attorney General's Office, Kentucky Fried Chicken and Dunkin' Donuts canceled their advertisements.[217] More significantly, however, neither company admitted any wrongdoing and Kentucky Fried Chicken continued to sell

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209. *See* John H. Chafee, Letter to the Editor, *Putting Some Teeth into Fast Food Regulation*, N.Y. TIMES, Aug. 8, 1996, at A26 (Senator John H. Chafee intimating that the nutritional brochures were introduced as insufficient remedies to concerns articulated by FFIA). Also, Chafee unsuccessfully reintroduced this bill in 1988. *See* Rob Wright, ST. NEWS SERVICE, Jan. 6, 1988.

210. *See What's in McNuggets? We'll Know Soon*, CRAIN'S CHI. BUS., July 14, 1986, at 74.

211. Trish Hall, *How Fat? Burger King to Post Answers*, N.Y. TIMES, Aug. 8, 1991, at B2.

212. Riley, *supra* note 143, at C3.

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* Frederick M. Winship, *N.Y. Stops Fast Food Companies' "Phony" Health Claims*, UPI, Oct. 30, 1991. In addition, regular donuts contained only two milligrams of cholesterol, which is considered dietarily insignificant. Riley, *supra* note 143, at C3.

217. Riley, *supra* note 143, at C3.

and promote its product in other parts of the country under the "Lite'n Crispy" label.[218]

Similarly noteworthy, 1991 also featured a voluntary agreement between the City of New York and Burger King.[219] Specifically, Burger King committed to prominently display large posters in its eighty New York City restaurants, and those posters would indicate the caloric content of frequently ordered meals.[220] Of course, Burger King, along with four other fast food restaurants, had espoused a similar promise in 1986, only to subsequently fail to honor such an obligation.[221] Consequently, it came as little surprise to see this latter agreement yield marginal effectiveness.[222]

New York's ability to persuade fast food companies into voluntarily revealing nutritional information reveals certain intrinsic characteristics in voluntary agreements, particularly in the context of fast food nutritional labeling. As a primary advantage, they allow individual fast food companies to tailor the means by which they disclose their dishes' nutritional content. In doing so, these companies may more effectively transmit information than they would upon complying with static, sometimes defeasible regulations.[223] Indeed, with voluntary agreements, the negotiation framework between industry and government enables company management to directly participate in the creation of objectives.[224] In contrast, with regulations, it is generally difficult to impose nuanced targets that incorporate the market variances of each company.

Second, voluntary agreements may generate faster and more efficient achievement of nutritional disclosure objectives than would

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218. *See id.*

219. *See* Hall, *supra* note 211, at B2.

220. *Id.*

221. *See supra* text accompanying notes 206–11.

222. *Id.*

223. For instance, since more than half of Burger King's sales derive through the drive-through window, this company could focus its nutritional disclosure resources toward those customers most likely to use the drive-through window. *See* Company A-Z: Facts and Figures on the Top Firms, CATERER & HOTELKEEPER MAG., *at* http://www.caterer-online.com/facts/companydetail.asp?ISiteSectionID=19&companyID=21152 (last modified July 6, 2004). This is a benefit often associated with voluntary environmental agreements. *See infra* note 227.

224. *See* PHILIPPE MENANTEAU, CAN NEGOTIATED AGREEMENTS REPLACE EFFICIENCY STANDARDS AS AN INSTRUMENT FOR TRANSFORMING THE ELECTRICAL APPLIANCE MARKET? § 4.1 (UNIVERSITÉ PIERRE MENDÈS FRANCE, INSTITUT D'ECONOMIE ET DE POLITIQUE DE L'ENERGIE, Research Paper No. 28(a), 2002), *available at* http://www.upmf-grenoble.fr/iepe/textes/Cahier28Angl.pdf. For an application of voluntary agreements to the health care setting, see generally I. Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253 (2004).

traditional command-and-control legislation. This is true because certain industries evince greater and a more sustained initiative to engage in cooperative arrangements.[225] Along these lines, because commitments are partly self-monitored by participating companies, governmental administration and monitoring costs are often reduced.[226] These benefits have proven especially manifest in voluntary agreements between the federal government and environmental polluters, and therefore, may hold similar promise in the context of fast food and nutritional disclosure.[227]

Third, voluntary agreements may foment change in public policy. Such a phenomenon occurred in New York City, as shortly after Burger King agreed to display nutritional posters, the Fast Food Ingredient Disclosure Ordinance of 1991 ("FFID")[228] was proposed. FFID would have required other fast food restaurants to follow the lead of Burger King, and it would have marked the first law in the country to mandate the furnishing of nutritional information for fast food dishes.[229] Despite

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225. *See, e.g.*, EUROPEAN COMM. OF DOMESTIC EQUIP. MFG., CRITIQUE OF THE WHITE PAPER ON GOVERNANCE 5 (2002) (applying efficiency benefits to manufacturing interests); Michael Boudin, *Regulation and Competition*, 49 U. CHI. L. REV. 1098, 1100 (1982) (noting arguments supporting the adaptation of federal antitrust law to eschew regulation and accommodate voluntary arrangements).

226. Menanteau, *supra* note 224, § 4.1.

227. In the context of environmental pollution, the prospect of avoiding litigation often compels polluters into voluntarily remedying excessive pollution. *See, e.g.*, Joseph A. Fischer, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the UCATA*, 30 HOUS. L. REV. 1979, 1994 (1994). This is especially evident in the oil tanker industry. *See* Sean D. Murphy, *Biotechnology and International Law*, 42 HARV. INT'L L.J. 47, 135 n.331 (2001).

228. N.Y. City, N.Y., Ordinance 766 (proposed Aug. 15, 1991).

229. *Unique Agreement*, *supra* note 206. Specifically, Fast Food Ingredient Disclosure Ordinance ("FFID") would have required fast food restaurants to:

> 1.. Conspicuously display an easy-to-read poster that shows the levels of calories, fat and sodium of major menu items. The poster will use a bar chart designed to show at a glance what percentages of the recommended daily maximum for these three components the food contains. The poster must include at least four breakfasts and four lunches/dinncrs, the least fatty and most fatty meals plus two in between.
>
> 2. Use trayliners at least half the times that a) disclose the same health-related information as the poster or; b) that feature thc healthiest menu items offered by the restaurant and contain advice on how to select menu items to reduce fat, sodium and calories.
>
> 3. Make available a brochure containing detailed ingredient and nutrition information for every item of food listed on the price menu board.
>
> 4. Include on their price menu boards a message that advises customers to read the poster and brochures for important health and ingredient information.

favorable support from health advocates, however, the ordinance did not advance.[230]

On the other hand, voluntary arrangements between fast food companies and governmental entities suffer from inherent flaws. For one, they are often implemented on an ad hoc basis, whereby some restaurants agree to cooperate, while others do not. To illustrate, consider, as one observer notes, "McDonald's has a number of high-fat, high-calorie menu items, but the *only* reason we know that for certain is because of its corporate policy of freely sharing that information."[231] In contrast, other fast food companies require written request before divulging their foods' nutritional content, thus "making quick decisions impossible."[232] Given that fast food is supposed to be "fast," having to draft written requests for nutritional information appears functionally inconsistent.

Similarly, voluntary agreements must involve widespread market participation for discernable consumer benefit. That is, if only Burger King agrees to reveal its dishes' nutritional content, and to only do so in New York, patrons of all other fast food restaurants remain uninformed. Indeed, pause to consider Kentucky Fried Chicken's response to voluntarily refraining from advertising the "Lite'n Crispy" sandwich in New York: it proceeded to market that product in other states, without apparent deterrence.[233]

Voluntary arrangements may also produce inconsistent results. For instance, McDonald's may utilize one method of revealing dietary information, while Burger King can employ a completely different standard. Along these lines, without any federal standard, fast food

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Id. Failure to comply with the law would result in fines of up to $5000, plus additional fines of up to $100 for each day the violation was not corrected. Ordinance 766 § 20-762.

According to Michael Jacobson, executive director of the Center for Science in the Public Interest, FFID represented a "breakthrough" and an ordinance that "represents the most effective way yet . . . for fast-food restaurants to provide useful information to their customers. . . . [It] will especially benefit those who eat fast food regularly." *Unique Agreement*, *supra* note 206. For a general discussion on the political machinations associated with FFID, see Pat Natschke Lenius, *Burger King Beefing Up Label Data*, SUPERMARKET NEWS, Aug. 19, 1991, at 41.

230. The failure of FFID was largely due to extensive opposition by the fast food industry. *Unique Agreement*, *supra* note 206.

231. Don Mauer, Editorial, *Nutritional Labeling: We Need More of It*, CHI. DAILY HERALD, Mar. 21, 2001, at 4 (emphasis added). Along these lines, consider that to the extent fast food companies offer nutritional information online, they often do so in widely varied formats and incomplete manners. *See supra* Part II.B.

232. Mauer, *supra* note 231, at 4. This parrots findings by the FTC that consumers often find limited value in nutritional disclosure after the point of sale. *See supra* Part II.B.

233. *See* Riley, *supra* note 143, at C3.

companies may communicate nutritional information in distractingly promotional ways, such as McDonald's "nutrition brochures" from the late 1980s.[234]

Perhaps the greatest conceptual weakness of voluntary agreements with fast food companies has concerned enforcement, or lack thereof. As discussed, despite initial praise for the 1986 Agreement between New York and five fast food companies, less than half of New York City restaurants offered the brochures by 1991, and none contained the posters.[235] Moreover, given the inability of any level of elective body—be it federal, state, or local—to require nutritional labeling from restaurants, voluntary agreements with fast food companies may lack the essential "threat" that renders voluntary agreements in other instances meaningful: lurking behind the call for effective voluntary compliance must be the potential that what is now voluntary may become compulsory.[236] Therefore, the underlying assumption that cooperation between government entities and fast food companies works better than deterrence proves unconvincing, at least to date.[237]

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234. For a contemporary example, note that display posters containing food nutritional content are usually scant or too difficult to understand. *See* T.H. Shrenk, *Mission Nutrition*, RESTAURANT BUS., May 15, 2004, LEXIS, News & Business, Wire Service Stories, BUS. WIRE. Also consider comments by Michael Jacobson (voluntary agreements often lead to "'[a] couple of companies hanging up posters that are a mass of numbers'"). Hall, *supra* note 211, at B2.

235. Hall, *supra* note 211, at B2.

236. *See* Mary Durfee, *Diffusion of Pollution Prevention Policy*, 566 ANNALS 108, 112 (1999) (explaining the value of deterrence in environmental voluntary agreements, in that firms tend to control greenhouse gas emissions only if they fear more costly mandatory controls in the absence of these voluntary reductions); *see also* Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1257 (1998) (noting that penalties must change the cost-benefit analysis of polluters; otherwise, the penalties accomplish little); Major Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"*, 40 A.F. L. REV. 1, 47 (contemplating use of international criminal law to buttress deterrence of environmental voluntary agreements).

237. This is likewise a problem concerning the environmental benefits of voluntary agreements between government entities and corporate polluters. *See, e.g.*, David W. Case, *The EPA's Environmental Stewardship Initiative: Attempting to Revitalize a Floundering Regulatory Reform Agenda*, 50 EMORY L.J. 1, 38 & n.227 (2001); Robert N. Stavins, *Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?*, 1997 U. CHI. LEGAL F. 293, 302 (1997) (examining voluntary agreements in the context of greenhouse gas emissions). The conceptual limitations of the New York fast food reforms are perhaps manifest today, as a proposed $350,000 obesity study was recently deemed "nonessential" by the New York Assembly, and thus removed from the state's budget. *See* Duggan, *supra* note 23, at A1. On the other hand, New York Assemblyman Felix Ortiz, who chairs a task force on food, farm, and nutrition policy, recently introduced Assembly Bill 5520, an Act to Amend the Public Health Law, in Relation to the Posting of Caloric Value,

B. The Implicit Notification Function of Light Menus

Unlike voluntary agreements, light menus have become common, albeit indirect, mechanisms for fast food companies to voluntarily signal their food's nutritional content. Since these menus have been introduced for purposes of generating profits, they reflect market preferences, rather than governmental impositions. Therefore, it is worth exploring whether industry incentives for communicating nutritional information may potentially render unnecessary any modification of the NLEA.

Selections from light menus are familiar to most. They typically include lower-fat versions of regular menu items, such as low-fat shakes and lower-fat hamburgers, and they became especially popular in the early 1990s, partly in response to a larger societal demand for more health-conscious lifestyle choices,[238] and partly in response to pressure from health-conscious groups.[239] In fact, from 1990 to 1997, fast food restaurants increasingly offered healthier menu choices.[240] At about the same time, fast food companies affirmatively altered their business model in order to appear more health conscious. For instance, many fast food restaurants switched from saturated to unsaturated fat for frying, and some removed the beef fat from french fries as well.[241]

Light menus, however, have generally not excelled at attracting customers.[242] Taco Bell, for instance, tried the "Border Light"

Carbohydrate, Fat and Sodium Content of Food Items. Assemb. B. 5520, 225th Leg., 1st Sess. (N.Y. 2003). The bill would require fast food and other restaurant chains to list fat, caloric, and sodium levels for items on their menu boards or regular menus. *See infra* Part V; *see also* Jon D. Lichtenstein, *The Case Against McDonald's: Teens Take On Corporate Giant*, N.Y. L.J., Apr. 4, 2003, at 4-5 (offering a discussion of Assembly Bill 5220).

238. *See* U.S. Dep't of Health and Human Servs., *A Fitness Classic*, 106 PUB. HEALTH REP. 600, 600 (1991) (demonstrating the increased fitness activity of the early 1990s); *see also* Paul J. Corcoran, *Use It or Lose It—The Hazards of Bed Rest and Inactivity*, 154 W.J. MED. 536, 536-38 (1991) (noting heightened awareness for the rehabilitation value of more frequent exercise).

239. *See* Burklow & Aubertin, *supra* note 46, at 326. Bonnie Liebman, director of nutrition at the Center for Science in the Public Interest, states that "[f]ast food is still not healthy, but if we keep the pressure on, the trend will continue." *Id. See also* Betsy D. Gelb & John Michael Bryant, *Minicase: Designing Health Promotion Programs by Watching the Market*, 12 J. HEALTH CARE MARKETING 65 (1992) (presenting study on market incentives for health-conscious groups to promote good health).

240. *See* Burklow & Aubertin, *supra* note 46, at 325.

241. *Id.* (noting that restaurants have also reduced the fat in the mayonnaise by 50%). On the other hand, most fast food restaurants still use trans-fatty acids when cooking food. *See Wild Oats Markets Removes All Products Containing Hydrogenated Oils*, HEART DISEASE WKLY., Mar. 14, 2004, at 73.

242. *See* Astrid Van Den Broeck, *The Research Behind the McLaunch*, STRATEGY, July 15, 2002, at 30 (studying how fast food companies have internalized

campaign in the early 1990s, featuring low-fat tacos and burritos, but customers preferred the more fattening and undoubtedly better tasting, options.[243] Customers also avoided Kentucky Fried Chicken's skinless fried chicken, as well as Pizza Hut's low-calorie pizzas.[244] Perhaps the most infamous example was McDonald's "McLean Deluxe," which was introduced in 1991 as the low-calorie alternative to the "Big Mac."[245] Although McDonald's expended $70 million promoting the McLean Deluxe in 1991, the company ceased marketing the item by 1992,[246] and discontinued it by 1997.[247]

Given the inability of light menu items to attract the appetites of fast food patrons, fast food companies have typically resisted suggestions to add new "healthy" options. For instance, while several health groups campaigned for McDonald's to introduce a "veggie burrito" dish, McDonald's repeatedly refused, simply because it did not project well in sales.[248] Likewise, Hardee's, which introduced a reduced-fat hamburger in 1990 only to remove it after insufficient sales,

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previous market miscalculations on consumer interest in low-fat food); *see also* Mark Johnson & John Fauber, *Obesity Changing Food Industry*, MILWAUKEE J. SENTINEL, Dec. 21, 2003, at 1A (noting how fast food companies greatly overestimated consumer interest in healthy food during the 1990s). On the other hand, some light menu selections have proven successful, such as Arby's "Roast Chicken Deluxe" and "Roast Chicken Santa Fe Sandwich." *See The Ultimate Irony: Fast Food as an Ally in the Battle of the Bulge; Arby's Extensive Light Menu Part of Low Fat Diet*, PR NEWSWIRE, Dec. 2, 1999.

243. *See* Su-Jin Yim, *Healthy Food Doesn't Appeal to Diners: Fast-Food Restaurants Give Menus Fat Chance*, RALEIGH NEWS & OBSERVER, Jan. 11, 1997, at D1. In fact, by 1998, Taco Bell had discontinued their campaign, while adding the "Gordita" entrée, which is Spanish for "little fatty." Patricia Alex, *Interest in Low Fat Foods Is Waning*, RECORD, Feb. 1, 1999, at H1.

244. Paul Farhi, *Low-Fat Fast-Food Figures to Be a Flop*, WASH. POST, Apr. 18, 1992, at D10.

245. *Id.*

246. *Id.*

247. Allen, *supra* note 48, at C1; *see also* John Przybys, *Quick Nutrition: Healthy Choices Can Be Found at Fast-Food Joints*, LAS VEGAS REV.-J., Aug. 27, 1997, at E1 (noting the effort put in by McDonald's in promoting the McLean Deluxe). Notably, one observer posits that the remarkable failure of the McLean Deluxe prompted McDonald's to introduce its most fattening selection of dishes in 1996. *See Fast Food: Fatter than Ever*, CONSUMER REP. ON HEALTH, Aug. 1996, at 85. Even some of the successful "healthy" options do not qualify as "healthy." Although not billed as a healthy option, Denny's offers a veggie burger, and it is conspicuously located near traditionally "healthy" options, such as salads and pitas, on the menu. Yet the veggie burger contains 665 calories and thirty-three grams of fat. Mitch Lipka, *Hold the Taco Salad if Losing Weight Is Goal*, FORT LAUDERDALE SUN-SENTINEL, Oct. 5, 2000, at 6B.

248. *See* Allen, *supra* note 48, at C1. In fact, according to a company spokesman, "'[t]he hamburger continues to be the flagship sandwich. We have to be responsive to our customers.'" *Id.*

concluded in an internal study: "[a]fter spending millions on research, we found, just by listening to the consumer, that *people are talking nutrition, but they buy on taste.*"[249] Other industry examinations corroborate this point: fast food patrons make their selections primarily on the basis of perceived taste, rather than price or health implications.[250] Not surprisingly, therefore, only 30% of consumers claim that they have eaten less fats, oils or red meat since the implementation of light menus.[251]

Despite the market insufficiencies of light menus, their mere presence may serve an important theoretical function when assessing the effectiveness of current nutritional labeling requirements: simply by offering "light" or "low fat" items, fast food restaurants may implicitly signal to their patrons that their regular items are neither "light" nor "low fat." As a result, the existence of "healthy" items may communicate (albeit in general, noncomparative terms) the nutritional content of regular items. If so, then those who consume regular items knowingly eat fattening foods, thus diminishing the need for labeling disclosure.

Two factors, however, limit the implicit notification function of light menus. First, light menu selections fail to illuminate the extent to which those selections are less fattening than regular selections, since regular selections may be offered without nutritional disclosure. Therefore, while a customer may obviously recognize that a low-fat salad menu item is less fattening than a double cheeseburger, the customer remains unaware of the precise fat content of that double cheeseburger. Perhaps more troubling, the absence of nutritional disclosure may delude the more health-conscious customer into selecting the wrong item. For example, a Burger King patron may select a veggie burger rather than a hamburger because she perceives that the former would prove a healthier selection. Absent requesting nutritional information from the store, however, she remains unaware that Burger King's veggie burger actually contains three more grams of fat than its hamburger.[252] Thus, the consumer fails to make an informed decision,

249. *See People Talk Lean Hamburgers but Buy Fatty Patties*, CHI. SUN-TIMES, Dec. 26, 1992, at 38 (emphasis added) (quoting Maurice Bridges, director of public affairs for Hardee's).

250. *See* Alex, *supra* note 243, at H1 (quoting Marvin Spira, executive director of the Eastern Perishable Products Association). A similar finding was made by Bonnie Briggs of NPD Crest, a market research firm: fast food consumers often state a preference for healthy fast food items while participating in focus groups, but then purchase fattening foods when they actually frequent fast food restaurants. *See* Martin Zimmerman, *Low-Fat Foodstuffs Fail to Bring Home the Bacon for Restaurants*, ARK. DEMOCRAT-GAZETTE, Mar. 20, 1996, at 4E.

251. Alex, *supra* note 243, at H1.

252. Derived by comparing a veggie burger with regular mayo to a hamburger,

and she remains oblivious to the nutritional content of these items as well.

Second, children may not infer the same comparative insight that adults infer from light menus. In fact, studies consistently find that most children fail to develop deductive reasoning skills until they are twelve to fifteen years old.[253] As a result, the implicit notification function of light menus appears especially muted for such younger patrons.[254]

Collectively, analysis pertaining to light menus suggests that fast food patrons generally prefer regular menu options, and by deducing that the mere presence of "healthy" fast food choices signals to adults that regular menu choices are not "healthy," it may be postulated that adult fast food patrons are, at least to a certain degree, knowingly eating foods of relatively high caloric and fat content. Children patrons of fast food restaurants, on the other hand, likely do not derive the same insight from light menus. In part for that very reason, the prospect of children patrons "blaming" fast food companies for their obesity and related diseases appears more plausible than it would in the context of adult patrons. The following Part evaluates the viability of such blame, and how it impacts the underlying fundaments of nutritional labeling.

IV. OBESITY-RELATED JURISPRUDENCE: DUTY AND ECONOMIC UNPREDICTABILITY

A. Pelman v. McDonald's Corp.

In 2003, the entire fast food industry appeared threatened by two obese New York City teens, Ashley Pelman and Jazlyn Bradley, who were plaintiffs in the first obesity class action lawsuit against a fast food restaurant to reach the stage of a dispositive motion.[255] In *Pelman v. McDonald's Corp.*, the plaintiffs brought a class action on behalf of all minors residing in New York State who purchased and consumed

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per data from http://www.bk.com/food/nutrition/nutritionwizard/index.aspx (last visited Nov. 17, 2004).

253. *See, e.g.*, Atwood, *supra* note 123, at 654–55 (interpreting JEAN PIAGET, JUDGMENT AND REASONING IN THE CHILD (1928)); *see also* James H. Bray, *Psychosocial Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAV. SCI. & L. 419, 427 (1991); Linda Whobrey Rohman et al., *The Best Interests of the Child in Custody Disputes*, *in* PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 59, 75 (Lois A. Weithorn ed., 1987).

254. However, upon further inspection, such a limitation appears less meaningful since parents tend to select or greatly influence the food consumption of children. *See supra* Part I.E.

255. *Pelman I*, 237 F. Supp. 2d at 518. Judge Sweet noted that *Pelman* is "the first of its kind to progress far enough along to reach the stage of a dispositive motion." *Id.*

McDonald's products, only to become obese and gravely ill, allegedly due to the consumption of the products.[256] Intriguingly, the *Pelman* case raises the prospect that litigation, rather than legislation or market incentives, may most efficiently enhance nutritional notification. Paradoxically, *Pelman* may also highlight conceptual restraints within the American tort system that discount such lawsuits as fundamentally misguided.

Pelman featured three core claims, sounding in negligence, products liability, and unfair business practices under New York law: (1) McDonald's misled the plaintiffs, through deceptive marketing campaigns, that its food products were nutritious and part of a healthy lifestyle if consumed on a daily basis; (2) McDonald's failed to disclose health risks associated with its products, and had the plaintiffs known those risks, they would not have regularly eaten McDonald's products; and (3) McDonald's engaged in unfair and deceptive acts and practices by erroneously representing that it provides nutritional brochures and information at all of its stores.[257] Conceptually, these claims averred the premise that consumption of McDonald's products causes obesity and related conditions, such as diabetes, coronary heart disease, high blood pressure, and elevated cholesterol, and that McDonald's should bear a duty to warn customers of these potential consequences.[258]

U.S. Federal District Court Judge Robert W. Sweet dismissed the complaint in January 2003, however, reasoning that the teens' own choices caused their obesity, that McDonald's bore no duty to protect citizens from "their own excesses,"[259] and that consumption of McDonald's products failed to implicate any danger outside "the common knowledge of consumers."[260] Despite the dismissal, Judge Sweet granted the plaintiffs leave to replead the complaint with greater specificity, and he noted the potential strength of the products liability claim, particularly if it could be shown that McDonald's created a more dangerous food than a consumer could reasonably expect.[261]

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256. *Id.* at 512, 516. The two teens were Ashley Pelman, 14, and Jazlyn Bradley, 19. Pelman stood 4'10" and weighed 170 pounds while Bradley stood 5'6" and weighed 270 pounds. Benjamin Weiser, *Big Macs Can Make You Fat? No Kidding, a Judge Rules*, N.Y. TIMES, Jan. 23, 2003, at B3.

257. *Pelman I*, 237 F. Supp. 2d at 527–33.

258. *See id.* For a further account of these claims, see generally Lichtenstein, *supra* note 237.

259. *Pelman I*, 237 F. Supp. 2d at 517–18, 533 ("If consumers know (or reasonably should know) the potential ill health effects of eating at [McDonald's], they cannot blame [McDonald's] if they, nonetheless, choose to satiate their appetite with a surfeit of supersized [McDonald's] products.").

260. *Id.* at 517, 523.

261. *Id.* at 531–32, 542–43.

The plaintiffs filed an amended complaint in February 2003, supplying greater specificity to the products liability claim, including rather audacious testimony by McDonald's officials concerning their products' nutritional values.[262] Nevertheless, the case was dismissed with prejudice in September 2003.[263] Specifically, as Judge Sweet concluded, "[t]he plaintiffs have made no explicit allegations that they witnessed any particular deceptive advertisement, and they have not provided McDonald's with enough information to determine whether its products are the cause of the alleged injuries."[264]

B. Determining the Existence and Desirability of a Legal Duty to Warn of Nutritional Content

The difficulties encountered by the *Pelman* plaintiffs shed light on the challenges of employing tort and product liability law to remedy possible harm caused by the consumption of fast food, particularly when compared with other product liability class actions. Indeed, class actions have successfully remedied injury caused by such products as cigarettes,[265] asbestos,[266] diet drugs,[267] and silicone breast implants.[268]

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262. For example, the plaintiffs quoted McDonald's chief nutritionist, Ann Rusniak, who claimed that it is possible to eat at McDonald's "three times a day, everyday" and have a healthy diet. Am. Brief for Plaintiff at 33, Pelman v. McDonald's, No. 02 Civ. 7821(RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 4, 2003) ("*Pelman II*"). The plaintiffs also quoted McDonald's spokesman Walt Riker as stating: "[E]ating McDonald's food can easily fit into a balanced diet. I eat its food every day, and I'm perfectly healthy." *Id.*

263. *Pelman II*, 2003 WL 22052778, at *15. Note also that in April 2003, Judge Sweet declined to expand the class to include a middle-aged woman with a similar passion for McDonald's products. Pelman v. McDonald's Corp., 215 F.R.D. 96, 97, 100 (S.D.N.Y. 2003) (reasoning that a forty-three-year-old woman failed to establish that the plaintiffs' lawsuit cannot continue without her). Under Rule 19(a) of the Federal Rules of Civil Procedure, a party should be joined only if: (1) in the party's absence, the court cannot grant complete relief among those already parties; (2) the absent party claims an interest related to the action and is so situated that disposition of the action without that party may impair its ability to protect its interests; or (3) failing to join the absent party subjects parties already in the litigation to a substantial risk of double liability or otherwise inconsistent obligations. FED. R. CIV. P. 19(a); *see also* Johnson v. Smithsonian Inst., 189 F.3d 180, 188–89 (2d Cir. 1999) (applying Rule 19(a)).

264. *Pelman II*, 2003 WL 22052778, at *14.

265. *See, e.g.*, Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 210 (E.D.N.Y. 2001) (holding that tobacco companies orchestrated a scheme to distort public knowledge concerning risks of smoking).

266. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997) (affirming denial of certification of class of potentially millions who had suffered injuries due to asbestos exposure).

267. *See, e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 282 F.3d 220 (3d Cir. 2002) (addressing injunction arising out of a class action of six million who took "diet drugs" that were later linked to vascular heart

Yet, unlike the danger posed by those products, the potential danger of fast food may prove immune from the American tort system, primarily because of the following: (1) an unclear duty on the part of fast food companies to "protect" their patrons from overconsumption; (2) the probable assumption of risk by patrons when knowingly eating fattening foods; and (3) a murky causation between fast food products, possible malfeasance on the part of fast food companies, and the patrons' ultimate ailments. The following subsections will evaluate these perplexities, and assess how they might help furnish optimal communication of nutritional information.

1. COMMON LAW DUTY TO WARN OR ASSUMPTION OF RISK BY OVERCONSUMPTION?

In any cause of action in tort or products liability, a plaintiff must establish four elements: (1) a duty recognized by the law requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty by the defendant; (3) a legal causation between the breach of that duty and the plaintiff's resulting injury; and (4) actual loss or damage suffered by the plaintiff.[269] This Subsection will ponder whether the law might impose a legal duty on the part of fast food companies to inform their customers of their products' nutritional content or the potential consequences of using those products or, alternatively, whether these patrons simply assume the risk of eating fast food.

Duty, in the context of the law, can be described simply as behavior which the law requires be done or forborne. For instance, a driver of an automobile has the legal duty to drive within the posted speed limit. Often, duty appears contextual, and the legal significance of two separate, yet identical actions can vary entirely on circumstance. For instance, consider the physical act of touching another person. In the famed *Vosburg v. Putney*, the court held, *inter alia*, that students bear a duty to avoid touching one another during class.[270] In contrast,

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disease).

268. *See, e.g., In re* Breast Implant Cases, 942 F. Supp. 958, 959-60 (S.D.N.Y. 1996) (discussing possibility of transfer of thousands of cases alleging injuries from silicone breast implants).

269. *See, e.g.*, La.-Pac. Corp. v. ASARCO Inc., 24 F.3d 1565, 1580 (9th Cir. 1994) ("The essential elements of a products liability claim under Washington law are duty, breach of duty, causation, and damage or injury."). For a general discussion of the elements of a torts or products liability claim, see WILLIAM L. PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS 164-65 (W. Page Keeton ed., 5th ed. 1984).

270. 80 Wis. 523, 527-28, 50 N.W. 403, 404 (1891).

Mohr v. Williams demonstrates that surgeons possess no duty to avoid touching patients during surgery.[271]

Duty may be imposed by common law or by statute.[272] Whether a common law duty exists depends upon the foreseeability of injury, and whether measures are needed to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.[273] Alternatively, a statutory duty arises whenever the plaintiff is a member of the class of persons that a statute was enacted to protect.[274] To illustrate the distinction between these two forms of duty, consider that a physician's statutory duty is typically to follow the regulations and statutes governing the medical profession and to do so with reasonable care and skill, while her common law duty requires her to practice to the same standard as does the reasonably competent physician.[275]

As illustrated in *Pelman*, obesity-related class actions turn on whether fast food companies carry a duty to warn consumers that consumption of their products may cause an addiction, which in turn may prompt overconsumption of those products, thereby triggering obesity and obesity-related disease. For two reasons, however, neither federal nor state law prescribes a statutory duty to warn. First, scientific evidence of addictive elements contained in fast food appears speculative, and largely unconvincing. Although recent studies have identified a correlation between weight gain and hormonal modifications that may impair one's ability to control eating,[276] no such precise

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271. *See* 104 N.W. 12, 16 (Minn. 1905). Naturally, however, there are certain limits to a surgeon's "touching" during surgery. For instance, a surgeon performing an appendectomy would exceed the boundaries of informed consent if she injures the arm of the patient during surgery. *See* Ybarra v. Spangard, 154 P.2d 687, 691 (Cal. 1944).

272. *See, e.g.*, Albers v. Ottenbacher, 116 N.W.2d 529, 531 (S.D. 1962) (noting both the statutory and common law forms of duties).

273. *See, e.g.*, Guillory *ex rel.* Guillory v. United States, 699 F.2d 781, 786 (5th Cir. 1983) ("[A] hospital is under a duty to exercise reasonable care to safeguard the patient from any known or reasonably apprehensible danger from himself and to exercise such reasonable care for his safety as his mental and physical condition, if known, may require."); Mounds Park Hosp. v. Von Eye, 245 F.2d 756, 764 (8th Cir. 1957) (stipulating that "no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen").

274. *See* Schooley v. Pinch's Deli Mkt., Inc., 951 P.2d 749, 754 (Wash. 1998).

275. *See* Michael A. McCann, *Message Deleted? Resolving Physician-Patient E-mail Through Contract Law*, 5 YALE J.L. & TECH. 103, 112–15 (2002–2003) (explaining the duties of physicians).

276. More specifically, as people put on weight, they become more resistant to the hormone leptin, which is linked to weight and appetite, and the brain peptide galanin, which stimulates eating. Leptin releases signals to the part of the brain that coordinates eating behavior, but as people gain weight they become more resistant to the effects of the hormone. Reuters, *Addictive Idea Chewed Over*, CALGARY SUN, Jan. 30, 2003, at 26; *see also* Michael Rosenbaum & Rudolph L. Leibel, *The Physiology of Body*

correlation between fast food consumption and hormonal or other bodily changes has been recognized.[277] Second, as discussed in Part II, NLEA explicitly exempts restaurants from the burden of disclosing the nutritional content of their dishes, absent suggestion that a particular dish promotes health.[278] Likewise, no state government has yet to impose labeling restrictions.[279] Therefore, neither federal nor state law assigns to fast food companies a statutory burden to reveal the "risks" of overconsuming regular fast food meals, as those products are not marketed as promoting good health.

Although fast food restaurants have likely complied with statutory duties prescribed by federal and state law, they may nevertheless have a state common law duty to warn patrons of the nutritional content of their food. The following analytical questions may help identify or dismiss the existence of a common law duty on the part of fast food companies to warn customers of the nutritional content of their food.

a. Inadequate Awareness or Assumption of Risk?

As a general matter, injuries arising from a food manufacturer's failure to provide adequate warnings of health risks associated with its food products are recoverable whenever food manufacturers are aware or should have been aware of these potential risks. For instance, in *Livingston v. Marie Callender's, Inc.*, a restaurant chain was held liable for selling vegetable soup containing undisclosed monosodium glutamate, a controversial food additive.[280] Likewise, in *Barry v. Don Hall Laboratories*, an Oregon court held a manufacturer liable for failing to warn that excessive sugar content within a popular vitamin product can lead to tooth decay.[281]

On the other hand, modern tort law recognizes that consumption of food inherently involves a tolerable degree of risk.[282] This principle is

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Weight Regulation: Relevance to the Etiology of Obesity in Children, 101 PEDIATRICS 525, 530–31 (1998) (explaining scientific link between obesity and hormonal changes).

277. *See* Buchholz, *supra* note 46, at 6, 19 (presenting a recent—and potentially biased—study commissioned by the U.S. Chamber of Commerce which concluded, "[fast food] meals . . . are not chemically addictive").

278. *See supra* Part II.A.

279. *See supra* Part III.A.

280. 85 Cal. 2d 528, 529 (Ct. App. 1999); *cf.* Allen v. Delchamps, Inc., 624 So. 2d 1065, 1068–69 (Ala. 1993) (holding a grocer liable for selling food containing undisclosed sulfites).

281. 642 P.2d 685, 688 (Or. Ct. App. 1982).

282. This concept is perhaps best articulated by section 402A of the *Restatement Second of Torts*: "[m]any products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm." RESTATEMENT (SECOND) OF TORTS, *supra* note 282, § 402A cmt. i.

also called the "common knowledge" doctrine,[283] which posits that a product shall not be deemed unreasonably dangerous when its inherent dangers are commonly known.[284] For instance, courts consider as common knowledge that eating uncooked pork may prove hazardous.[285]

Working in tandem with the common knowledge doctrine is the principle of "assumption of risk," which dictates that a person who voluntarily exposes himself to a known risk forfeits the opportunity to recover for injuries sustained as a result of that exposure.[286] Put differently, by taking the chance of injury from a known risk, the plaintiff consents to relieve the defendant of its duty toward him.[287]

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283. A similar, if not identical, principal of the common knowledge doctrine is the "patent danger" rule. This rule dictates that "when the defects in . . . a product's design were obvious . . . the manufacturer could not be held liable for injuries that resulted." *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 200–01 (2d ed. 2002). *See generally* Stanton G. Darling II, *The Patent Danger Rule: An Analysis and a Survey of its Vitality*, 29 MERCER L. REV. 583 (1978) (discussing the patent danger rule). The case most identified with the patent danger rule was *Campo v. Scofield*, 95 N.E.2d 802 (N.Y. 1950). However, this rule has been overruled in many jurisdictions. *See, e.g.*, Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1170–72 (Fla. 1979) (holding that patent danger rule was replaced by comparative negligence); Micallef v. Miehle Co., 348 N.E.2d 571, 577 (N.Y. 1976).

284. *See* Wright v. Brooke Group Ltd., 114 F. Supp. 2d 797, 810–12 (N.D. Iowa 2000) (expressing common knowledge doctrine).

285. *See, e.g.*, Scheller v. Wilson Certified Foods, Inc., 559 P.2d 1074, 1077 (Ariz. Ct. App. 1977); *cf.* Raschke v. Carrier Corp., 703 P.2d 556, 559 (Ariz. Ct. App. 1985) (affirming summary judgment for gas furnace manufacturer because it is common knowledge that adequate ventilation is required for the furnace's proper operation); Brown v. Sears, Roebuck & Co., 667 P.2d 750, 756 (Ariz. Ct. App. 1983) (affirming summary judgment in favor of electrical extension cord manufacturer because it is common knowledge that frayed or cut electrical cords pose a dangerous threat to people who use them); Durkee v. Cooper of Can., Ltd., 298 N.W.2d 620, 621 (Mich. 1980) (noting that failure to warn of apparent danger may be regarded as inconsequential).

286. *See, e.g.*, Ferguson v. Chemetals Inc., 17 Fed. Appx. 325, 329 (6th Cir. 2001) (holding that assumption of risk is evident if plaintiff was aware of risk or risk was inherent in his line of work); Little v. United States, No. 98-1835, 1999 WL 381822, at **7 (4th Cir. June 11, 1999) (noting that "[i]n order to establish assumption of risk, the defendant must prove that the plaintiff: '(1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger") (quoting ADM P'ship v. Martin, 702 A.2d 730, 734 (Md. 1997)); Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 484 (3d Cir. 1965). *But see Little*, 1999 WL 381822, at **7 (reasoning that the plaintiff's awareness of the "general risk" of sitting on concrete tables was not sufficient to satisfy the assumption of risk when the plaintiff was not aware that the specific table was dangerous).

287. Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652, 657 (3d Cir. 1989); *see also* Green v. Sanitary Scalc Co., 431 F.2d 371, 373–75 (3d Cir. 1970) (dictating that assumption of risk is based on the notion that, by taking the chance of injury from a known risk, the plaintiff has consented to relieve the defendant of its duty toward him); Staymates v. ITT Holub Indus., 527 A.2d 140, 146 (Pa. 1987) (finding that the basis of assumption of risk is consent to accept the risk); RESTATEMENT (SECOND) OF TORTS, *supra* note 282, § 496C cmt. h. (stating that the conduct "must be

Typically, courts identify the presence of assumption of risk whenever "'a person of normal intelligence in the position of the plaintiff'" would have understood the danger.[288] For instance, a person who knowingly consumes a glass of hot chocolate assumes the risk of injury resulting from the drink's temperature.[289]

The concepts of common knowledge and assumption of risk influence the plausibility of obesity-related claims against fast food companies. On one hand, since fast food companies bear no statutory duty to furnish nutritional information,[290] some of their patrons may theoretically fail to recognize that consumption of such food may contribute to obesity and disease. On the other hand, *Pelman* held that McDonald's owed no duty to prevent its customers from "their own excesses"[291]—language which distinctly alludes to section 496 of the *Restatement Second of Torts*—to imply assumption of risk from the plaintiff's conduct, the conduct "must be such as fairly to indicate that the plaintiff is willing to take his chances."[292] Perhaps equally meaningful, the American public largely believes that fast food patrons are "taking their chances."[293] In fact, according to one recent study of American attitudes toward obesity and fast food consumption, 7.1% of Americans contend that, "[i]f people are overweight, it is their own fault" while only 2.9% regard the influence of fast food companies as

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such as fairly to indicate that the plaintiff is willing to take his chances").

288. Stolting v. Jolly Roger Amusement Park, Inc., 37 Fed. Appx. 80, 84 (4th Cir. 2002) (quoting Schroyer v. McNeal, 592 A.2d 1119, 1123 (Md. 1991)); *see also Schroyer*, 592 A.2d at 1123 (affirming objective analysis for use of assumption of risk defense); Fish v. Gosnell, 463 A.2d 1042, 1048 (Pa. 1983) (noting that defendant must produce evidence that the plaintiff fully understood the specific risk, and yet voluntarily chose to encounter it).

289. *See, e.g.*, McCroy v. Coastal Mart, Inc., 207 F. Supp. 2d 1265, 1277-78 (D. Kan. 2002) (finding that a seller of hot chocolate was not liable for failing to warn that hot chocolate is, in fact, hot, since "[t]here is no duty to warn of dangers *actually known* to the user of a product") (quoting Brand v. Mazda Motor Corp., 978 F. Supp. 1382, 1389 (D. Kan. 1997). For an illustration outside the context of food, see Coln v. City of Savannah, 966 S.W.2d 34, 42-43 (Tenn. 1998) (stating that a person who watches a baseball game from an unscreened seat assumes the risk of being hit by a baseball).

290. *See supra* Part II.A.

291. 237 F. Supp. 2d at 533.

292. RESTATEMENT (SECOND) OF TORTS, *supra* note 282, § 496C cmt. h. For an application of this premise in the context of tire safety, see Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652, 657 (3d Cir. 1989). *See also Pelman I*, 237 F. Supp. 2d at 517-18 (declaring that "[i]f consumers know (or reasonably should know) the potential ill health effects of eating at [McDonald's], they cannot blame [McDonald's] if they, nonetheless, choose to satiate their appetite with a surfeit of supersized [McDonald's] products").

293. Mark Dolliver, *Assigning Blame; At a Gut Level—Literally—We Prefer to Take Responsibility for Our Fat(e)*, ADWEEK, June 9, 2003, at 45.

explanatory.[294] These findings are significant, for if a fast food patron is held to have assumed the risk of consumption, she would then relieve the fast food company of any common law duty to notify her of nutritional information.

Along these lines, it appears unlikely that fast food companies possess a common law duty to divulge the nutritional content of their food simply "because of the inclusion of high levels of cholesterol, fat, salt and sugar."[295] Polling data signals broad public awareness of the tendency of fast food to contain such attributes,[296] and *Oliver v. Heavenly Bagels, Inc.* dictates that "[w]here . . . a product by its very nature has a dangerous attribute, liability is imposed only when the product has an attribute not reasonably contemplated by the purchaser or is unreasonably dangerous for its intended use."[297] Notably, this very conclusion was reached in *Pelman*: "[t]here is no allegation that [McDonald's] of New York had in its possession any particular knowledge that consumers did not have that would require it to promulgate information about the nutritional contents of the products."[298] Moreover, most fast food companies offer some nutritional information online, as well as in stores—if requested by a patron.[299]

Then again, while fast food patrons may indeed recognize that consumption of fast food can lead to obesity, they often fail to recognize the *extent* to which such consumption may harm them, particularly since they frequently underestimate the levels of cholesterol, fat, salt, and sugar in fast food,[300] and often miscalculate or confuse the relative nutritional content of fast food items.[301] Significantly, when determining common law duties, courts routinely emphasize the concept of "extent of knowledge." For instance, in *Guevara v. Dorsey Laboratories*, the

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294. *Id.*

295. *See Pelman I*, 237 F. Supp. 2d at 531.

296. *See supra* Part I.D.

297. 729 N.Y.S.2d 611, 613 (App. Div. 2001). This principle is also evident in state codes. For instance, section 2307.76(B) of the Ohio Revised Code provides that "[a] product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge." OHIO REV. CODE ANN. § 2307.76(B) (2001).

298. 237 F. Supp. 2d at 522.

299. *See supra* Part II.B.

300. *See supra* Part I.D.

301. *See supra* Part III.D (discussing unexpected content of such items as veggie burgers); *see also Pelman I*, 237 F. Supp. 2d at 535 (chastising McDonald's by doubting that a reasonable consumer would know that a Chicken McNugget—"seemingly a healthier option than McDonald's hamburgers"—contains twice the fat of a McDonald's hamburger per ounce, or that McDonald's french fries contain citric acid, dextrose, and sodium acid pyrophosphate).

U.S. Court of Appeals for the First Circuit affirmed that a common law duty to warn arises whenever a product is "'dangerous *to an extent* beyond that which would be contemplated by the ordinary consumer who purchases it.'"[302] This principle was also recently evident in tobacco litigations. Most illustratively, consider *Engle v. R.J. Reynolds Tobacco Co.*,[303] where the plaintiffs acknowledged their long-term awareness of risks associated with smoking, yet they successfully demonstrated that cigarette manufacturers "knew of dangerous aspects of their products beyond those commonly understood and therefore were responsible for the smokers' continued addiction."[304]

Therefore, it appears that fast food patrons tend to *partially* assume the risk of fast food consumption: they understand that consumption of fast food may hasten obesity, which, in turn, may precipitate the onset of disease, yet they underestimate or discount this relationship because of insufficient information. This is, of course, a parallel interpretation to that employed by lung cancer victims who became ill after years of smoking and years of certain subterfuge by the tobacco industry.[305] As will now be explored, for individuals who overconsume fast food, inadequate recognition of risk would seem especially troubling.

b. Overconsumption: Intended Use, Foreseeable Misuse or Product Misuse?

To introduce the next step in the analysis of a potential common law duty to warn, consider that fast food companies, like all companies, need only warn about risks associated with intended use or foreseeable misuse of their products.[306] Thus, when a consumer uses a product in an

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302. 845 F.2d 364, 367 (1st Cir. 1988) (emphasis added) (citing Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974) (quoting RESTATEMENT (SECOND) OF TORTS, *supra* note 282, § 402A cmt. i)).

303. 122 F. Supp. 2d 1355 (S.D. Fla. 2000) (remanding to state court following removal on July 24, 2000, which followed the July 14, 2000 jury verdict awarding $145 billion punitive damages in state court).

304. Grief v. Anheuser-Busch Cos., 114 F. Supp. 2d 100, 103 (D. Conn. 2000) (noting the plaintiff's success in *Engle*).

305. For an illuminating discussion on the partial assumption of risk in the context of tobacco use, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1422, 1502–27 (1999).

306. *See, e.g.*, Knowlton v. Deseret Med., Inc., 930 F.2d 116, 122–23 (1st Cir. 1991) (holding that a reasonable jury could have concluded that a device manufacturer knew a catheter was being used in open-heart surgery); Sutherland v. Elpower Corp., 923 F.2d 1285, 1289 (8th Cir. 1991) (holding that a toy manufacturer could be held liable for failure to warn about "reasonably foreseeable, albeit unintended, uses" of its product); Harville v. Anchor-Wate Co., 663 F.2d 598, 602–03 (5th Cir. 1981) (defining misuse as use of a product where it is handled "in a way which the manufacturer could

unforeseeable manner, courts typically absolve manufacturers and sellers of liability,[307] and classify such consumer behavior as "product misuse."[308] Accordingly, the foreseeability of a particular misuse often determines the existence of a duty to warn.

Naturally, the primary, if only, intended use for fast food, like any food, is its consumption. A more engaging analysis concerns whether the *over*consumption of fast food shall be considered an intended use, foreseeable misuse or simply product misuse.

As highlighted by *Pelman*, fast food companies routinely extol the virtues of regularly consuming fast food, thus perhaps positing overconsumption as an "intended" use.[309] As recently as 2002, McDonald's chief nutritionist championed the possibility of eating McDonald's "three times a day" and, likewise, a McDonald's spokesman blithely declared, "[e]ating McDonald's food can easily fit into a balanced diet. I eat its food every day, and I'm perfectly healthy."[310] On the other hand, eating something "three times a day" or "everyday" does not, per se, suggest "overconsumption"; indeed, Americans are expected to eat three meals a day, everyday. Moreover, rather than evincing instructions for use, statements encouraging regular consumption of a particular product may better resemble "mere puffery," or exaggerated declarations that make no specific claims on which consumers can rely. The *Pelman* court considered it as such.[311] Consequently, it appears doubtful that overconsumption of fast food shall best be considered an "intended" use.

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not have reasonably foreseen or expected in the normal and intended use of such [product]"); Johnson v. Husky Indus., 536 F.2d 645, 648 (6th Cir. 1976) (finding that a manufacturer of charcoal briquettes could be held liable for inadequately warning against indoor use for heating); Burch v. Sears, Roebuck & Co., 467 A.2d 615, 620 (Pa. Super. Ct. 1983) (reasoning that an electric lawn mower "might stall and that a user might attempt to unclog the blade by placing some part of his body near the blade").

307. *See* Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 545 (Iowa 1980); *see also* Ford Motor Co. v. Matthews, 291 So. 2d 169, 172-73 (Miss. 1974) (highlighting consumer expectations in determination of reasonableness of danger). The dual requirement that the plaintiff prove a product to be both defective and unreasonably dangerous serves only to distinguish defective products from those foods or drugs which necessarily involve some risk of harm, if only from overconsumption. *See* Knitz v. Minster Mach. Co., 432 N.E.2d 814, 817 n.2, 818 (Ohio 1982); *see also* Cremeans v. Int'l Harvester Co., 452 N.E.2d 1281, 1283-84 (Ohio 1983) (finding the "unreasonably dangerous" requirement may not apply where the plaintiff cannot prove that the product is not as safe as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner).

308. *Hughes*, 288 N.W.2d at 545.

309. 237 F. Supp. 2d at 527.

310. Am. Brief for Plaintiff at 33, *Pelman II*, (No. 02 Civ. 7821(RWS)).

311. 237 F. Supp. 2d at 528 (finding that "[m]erely encouraging consumers to eat its products 'everyday' is mere puffery, at most, in the absence of a claim that to do so will result in a specific effect on health").

Determining whether overconsumption of fast food shall be considered foreseeable misuse or product misuse ostensibly proves more challenging. At first glance, a consumer's decision to overconsume fast food signals notions of common knowledge and assumption of risk—as the inherent dangers of eating too much food are well known.[312] Section 402A of the *Restatement Second of Torts*, in fact, endorses this sentiment: "[i]f the injury results . . . from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable."[313] "[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized."[314] Even more revealingly, section 402A cites as a relevant example "foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart."[315] Certainly, fast food readily illustrates a food "containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart."[316]

Along these lines, it may prove illuminating to consider how courts have treated the overconsumption of other food products, particularly if duties have arisen from such overconsumption. Consider, for instance, whether the overconsumption of alcohol shall constitute foreseeable misuse or product misuse. This very question became a common one in courts during the late 1980s, prior to federally mandated alcohol warning requirements,[317] as well as the imposition of NLEA requirements on nonrestaurant food and beverages.[318] Revealingly, courts consistently declined to impose a duty upon distillers to warn of overconsumption, reasoning primarily that individuals bear the duty to moderate their own intake. To illustrate, observe *Brown Forman Corp. v. Brune*, where a Texas court held:

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312. *See supra* Part I.A.

313. RESTATEMENT (SECOND) OF TORTS, *supra* note 282, § 402A cmt. h.

314. *Id.* § 402A cmt. j.

315. *Id.*; *see also Pelman I*, 237 F. Supp. 2d at 537 (affirming the concept underlying section 402A, the court noted, "[p]laintiffs cite no case law to support the contention that overconsumption of a food product may be considered a misuse").

316. RESTATEMENT (SECOND) OF TORTS, *supra* note 282, § 402A cmt. j.

317. *See* 27 U.S.C. § 215(a) ("(1) According to the surgeon general, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems."); Joseph E. Seagram & Sons v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991) (holding that an alcohol manufacturer has no duty to warn of danger of becoming an alcoholic from excessive consumption of alcoholic beverages).

318. *See supra* Part II.A.

> [T]he alcoholic beverage drinker maintains the ultimate power and thus the obligation to control his own drinking behavior. . . . [T]here will always be individuals who, though informed about the dangers associated with the use of alcoholic beverages, choose to misuse the product. . . . [W]e conclude that no legal duty existed on the part of Braun-Forman to place a warning on its containers of tequila that overconsumption of tequila within a short period of time may cause death.[319]

Similarly, courts expected "ordinary everyday consumers" to know better than to overconsume alcohol. Specifically, courts have regularly held that "the ordinary everyday consumer surely understands that overconsumption of beer may have harmful, and even disastrous effects. . . . *Furthermore, the intended use of beer is for consumption by adults in moderate amounts.*"[320]

Upon reviewing the legal framework of duties arising from the overconsumption of alcohol, several intriguing questions emerge. For one, do the consumption choices of fast food patrons resemble those of beer or liquor drinkers, in that society should presume they recognize the consequences of overconsumption? In other words, should fast food patrons "know their own limits"? Also, would holding fast food restaurants liable for the overconsumption of certain patrons trigger an unintentional, and likely undesirable consequence: employees of fast food restaurants bearing the responsibility to somehow monitor the eating patterns of their patrons, like bartenders or waiters?[321]

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319. 893 S.W.2d 640, 645–47 (Tex. App. 1994); *see also* Malek v. Miller Brewing Co., 749 S.W.2d 521, 524 (Tex. App.· 1988) (finding that an alcohol manufacturer had no legal duty to warn of the consequences arising from excessive consumption of alcohol).

320. Hon v. Stroh Brewery Co., 835 F.2d 510, 516 (3d Cir. 1987) (quoting Rohe v. Anheuser Busch, Inc., No. C-2-82-161, slip op. at 8–9 (S.D. Ohio Apr. 15, 1983)); *see also* Desatnik v. Lem Motlow, Prop., No. 84 C.A. 104, 1986 WL 760, at *4 (Ohio Ct. App. Jan. 9, 1986) (finding that death caused by an overdose of alcohol not grounds for imposing liability on manufacturer); Pemberton v. Am. Distilled Spirits Co., 664 S.W.2d 690, 693 (Tenn. 1984) (declining to find liability for death caused by single overdose of grain alcohol); Morris v. Adolph Coors Co., 735 S.W.2d 578, 583 (Tex. App. 1987) (holding that "[t]he ordinary consumer in today's society, with the ordinary knowledge common to the community as to the characteristics of the product, knows of the dangers of driving while intoxicated").

321. Representative Keller suggests this very point:

> Essentially [a successful class action obesity suit] would convert the 18-year-old kids who work in places like McDonald's into bartenders who would have to look at someone like me and say, "Sorry congressman, I'm going to have to cut you off. I can't give you that hot apple pie. You've had enough. Look at you."

Alternatively, since only restaurant food was exempted from nutritional labeling requirements, has Congress purposefully determined that restaurant-goers, which by definition include fast food patrons, harbor *greater* awareness for the consequences of overconsumption than do consumers of groceries or alcohol?[322]

On the other hand, consider the following nuance: if fast food restaurants recognize that certain patrons, whether for biological or social reasons, are uniquely predisposed to consuming large portions, could they then bear a common law duty to warn? Although most state courts have refrained from identifying such a duty for risks that affect few individuals,[323] a few have held otherwise in cases where hypersensitive individuals could suffer serious injury.[324] For instance, in *Davis v. Wyeth Laboratories, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that a drug company bore a duty to warn of the less than one-in-one-million risk of contracting polio from its vaccine.[325]

Interestingly, despite the seeming ubiquity of fast food restaurants, those who frequent them appear to be a remarkably discernable group of individuals. In fact, McDonald's internal surveys find that "72% of its customers are 'Heavy Users,' meaning they visit McDonald's at least once a week," and of that group, "22% are 'Super Heavy Users,' . . . meaning they eat 'at McDonald's ten times or more a month.'"[326] In stark contrast, then, only the remaining 28% of McDonald's customers visit the chain less than once per week, thus illustrating that those who eat at McDonald's are usually regular, perhaps long-time customers, rather than infrequent visitors. Indeed, though no scientific link may exist between fast food consumption and

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Mike Schneider, *Bill Would Outlaw Blaming Restaurants for Obesity*, AP, Jan. 27, 2003, *available at* http://www.defeatdiabetes.org/Articles/law030127.htm.

322. A thorough review by the author of the congressional testimony associated with the NLEA did not indicate such a purpose.

323. *See* Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 346 (1994) (noting "[m]anufacturers generally do not have a duty to warn of risks that may affect only very few individuals").

324. *Id.*; *see, e.g.*, Basko v. Sterling Drug, Inc., 416 F.2d 417, 430 (2d Cir. 1969) (finding that a drug manufacturer may have the duty to warn "'those few persons whom it knows cannot apply its product without serious injury'"); Wright v. Carter Prods., 244 F.2d 53, 56, 58 (2d Cir. 1957) (holding that a manufacturer of deodorant that caused skin rash in a tiny percentage of its users may have the duty to warn).

325. 399 F.2d 121, 129–30 (9th Cir. 1968) (determining that "[w]hen, in a particular case, the risk qualitatively (for example, of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true ehoice judgment, medical or personal, the warning must be given").

326. *Pelman II*, 2003 WL 22052778, at *1 (citing trial testimony of McDonald's U.S. Vice President of Marketing David Green).

addiction,[327] the conspicuous frequency at which certain individuals consume fast food may suggest an unyielding affinity or perhaps even dependency.

In light of such consumption trends, would *Davis* suggest that fast food companies bear a duty to warn? Significantly, consider that *Davis* only identified a duty because, absent using the vaccine, the risk of contracting polio was equally small.[328] In contrast, upon applying that principle to fast food consumption, it appears possible, if not probable, that one who frequently consumes fast food would become obese through other means (for example, increased home cooking), absent the opportunity to further consume fast food. Indeed, would not overconsumption of all foods result in risk to one's health? Moreover, even assuming arguendo that fast food contains some "addictive" quality that compels certain predisposed patrons to overconsumption (that is, similar to an allergic reaction), that alone would not entail a duty. As a matter of fact, courts have held that those with common food allergies, such as to peanuts or to strawberries, will be aware of them in restaurant dishes, and thus not be entitled to warning.[329]

On balance, it appears that the overconsumption of fast food better resembles product misuse than foreseeable misuse, thus diminishing the need for a duty to warn. This seems most clear when contrasting the overconsumption of fast food with that of alcohol, which has been identified as an informed consumer risk, as well as when recognizing such overconsumption as a potential, but not exclusive means by which one may become obese. Nevertheless, unlike overconsumers of alcohol, those who overconsume fast food may not fully recognize the extent of risk without actual knowledge of nutritional content. This would seem especially true with regard to children.

c. Duty to Warn Children Customers?

Even if fast food companies bear no common law duty to reveal the content of their food to adult patrons, they may still have a duty to their children patrons, who are their foremost advertising target. As discussed in Part 1, children lack the cognitive and reasoning skills of adults, thus making their food selections less reasoned, and perhaps

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327. *See supra* notes 263–64 and accompanying text.

328. *See* 399 F.2d at 129–30.

329. *See, e.g.*, Thompson v. Eastern Pac. Enters., No. 49924-6-I, 2003 WL 352914, at *1, *6 (Wash. Ct. App. Feb. 18, 2003) (holding that a customer who had a severe allergic reaction after eating almond chicken ordered from defendant's restaurant failed to establish a duty on the part of the restaurant to warn of possible inclusion or cross contamination of peanut or peanut products).

more deserving of explicit information.[330] Equally significant, courts have more willingly imposed common law duties upon those industries that pursue children customers, particularly since children are often unable to discriminate between news and commercials, as well as educative and persuasive intent.[331] Therefore, assessing the fast food industry's particular interest in children may illuminate any intrinsic value in imposing an age-specific duty to warn.

As a starting point, consider the child-centered marketing strategies employed by the fast food industry. These strategies typically call for children to observe recurrent images, including representations on television, product placements in children's movies, billboards on school buses, and offers to obtain popular toys upon purchasing meals.[332] Along these lines, such strategies tend to promote inexhaustible consumption, as well as insinuate that children who consume fast food tend to be attractive, popular, and athletic.[333]

Perhaps revealingly, the style and substance of these child-centered marketing strategies resemble those employed by the tobacco industry and, more importantly, those which have triggered a duty to warn for tobacco companies.[334] Indeed, the similarity of such strategies may be

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330. *See supra* Part I.E.

331. *See id.*

332. *See id.* Even public elementary school teachers have resorted to passing out fast food toys. *See* Sue Weibezahl Naylor, *Students' Growth Isn't Always for the Best*, SYRACUSE HERALD-J., Dec. 30, 1991, at B3 (citing a survey conducted by Wendy Wolfe of Cornell University which found that teachers often reward students with candy or snacks associated with fast food promotions).

333. For instance, examine how Burger King promotes its "Big Kids Meal," a meal which contains approximately 700 to 1,000 calories or more than two-thirds of the recommended daily caloric intake for children: it is advertised with pictures of fit-looking children, while depicting the rhetorical question and answer, "'Do you want to be a Big Kid? You Should.'" *See* Goodman, *supra* note 96, at A19. For the complete nutritional information of the Burger King Big Kids Meal, see Burger King Corp., *Big Kids Meal*, *at* http://www.bk.com/food/products/big_kids_meal.aspx (last visited Nov. 17, 2004); Burger King Corp., *Nutritional Facts*, *at* http://www.bk.com/Food/Nutrition/NutritionWizard/index.aspx?bid=8 (last visited Nov. 17, 2004). Also note that while certain companies have begun to incorporate ostensibly "prochildren's health" initiatives, such as Burger King's sponsorship of the "Presidential Active Lifestyle and Physical Fitness Award" for athletic children, their message appears muted, if not contradicted, by their intense marketing. On Burger King's website, for instance, a text hyperlink to information on the fitness award appears above a pictured hyperlink of a "Double Cheeseburger Combo" meal, an item containing approximately 1200 calories. *See* Burger King Corp., *Burger King Big Kids Club*, *at* http://burgerking.com/BigKids/index.aspx (last visited Nov. 17, 2004); Burger King Corp., *Nutritional Facts*, *at* http://www.bk.com/Food/Nutrition/NutritionWizard/index.aspx (last visited Nov. 17, 2004).

334. *See* Goodman, *supra* note 96, at A19; Richard Daynard, head of Northeastern University's Tobacco Products Liability Project, has stated: "food

illustrated by *United States v. Philip Morris Inc.*, where the court described the promotional techniques routinely adopted by the tobacco industry:

> [d]efendants have advertised in stores near high schools, promoted brands heavily during spring and summer breaks, given away cigarettes at places where young persons congregate, paid for product placement in movies with youth audiences, placed advertisements in magazines with high youth readership, and sponsored sporting events, rock concerts, and other events of interest to children.[335]

In fact, in some respects, the child-centered strategies advanced by the fast food industry have proven more absorbing than those utilized by tobacco companies. To illustrate, consider that while 96% of children recognize "Ronald McDonald" as a symbol of fast food, only 72% recognize "Joe Camel" as a symbol of cigarettes.[336] Consequently, imposing a similar common law duty upon fast food restaurants may prove likewise desirable, particularly considering the inability of children to distinguish promotion from information, as well as the tendency of humans to develop lifelong eating habits as children and the surging social cost of obesity.[337]

The utility of imposing such a duty, however, must also account for intervening and perhaps more explanatory considerations, namely the role played by parents in determining their children's food choices, as well as other lifestyle influences that may contribute to childhood obesity. Along these lines, consider that 30% of American parents report having overweight children,[338] and 48% believe their children consume excessive amounts of fast food.[339] Therefore, parents

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companies have very sophisticated motivational people on their payroll to figure out how to get kids to use their product." *Id.* For a methodical analysis of tobacco advertising, see generally David A. Kessler et al., *The Food and Drug Administration's Rule on Tobacco: Blending Science and Law*, 99 PEDIATRICS 884 (1997).

335. 116 F. Supp. 2d 131, 139 (D.D.C. 2000).

336. *See Lorillard Tobacco*, 533 U.S. at 558.

337. *See supra* Part I.E.

338. *See* Bella English, *The Big Battle: A Generation of Overweight Kids Struggles to Reshape Eating and Exercise Habits*, BOSTON GLOBE, Aug. 13, 2003, at D1.

339. Marjorie Connelly, *More Children Are Obese, and More Americans Know It*, N.Y. TIMES, May 13, 2003, at F5; *see also Pediatric Obesity; Report Card May Encourage Parents to Help Their Overweight Children Lose Weight*, HEALTH & MED. WK., Aug. 25, 2003, at 576 (concluding that "'[a]mong overweight children, the health report card was associated with an increased parental awareness of their child's weight status'"). However, parental awareness of their children's obesity often does not

acknowledge significant awareness of, if not acquiescence to, their children's weight and eating habits. This proves particularly meaningful upon considering that parents often decide or greatly influence their children's food choices and levels of consumption.[340]

Socioeconomic changes within the American family also appear consequential. Perhaps most significantly, both parents are more likely to work, and to work longer hours than in the past, thus diminishing the percentage of parents who find time to prepare meals for their families.[341] Correspondingly, families are more inclined to purchase preprepared meals from restaurants, including fast food restaurants, which generally provide larger and less nutritious servings.[342] This is perhaps most evident among families of modest wealth or those with single parents, as they often regard fast food not only as a convenience, but also as an economical substitute.[343] Similarly, consider that families in lower-income neighborhoods frequently lack access to supermarkets, thus increasing the appeal of fast food.[344] As a result, studies find that children from economically disadvantaged or single-parent households

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emerge until after age five, and studies have demonstrated correlation between parental level of education and parental awareness of children's obesity. *See* Amy E. Baughcum et al., *Maternal Perceptions of Overweight Preschool Children*, 106 PEDIATRICS 1380, 1384 (2000).

340. *See supra* Part I.E.

341. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, WORK AND WORK-RELATED ACTIVITIES OF MOTHERS RECEIVING TEMPORARY ASSISTANCE TO NEEDY FAMILIES: 1996, 1998, AND 2000, at 3 (2002) (noting that approximately 72% of mothers work and the corresponding effects on behavior within the family), *available at* http://www.census.gov/prod/2002pubs/p70-85.pdf.

342. *See supra* Part I.B.

343. *See generally* Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *The New Morbidity Revisited: A Renewed Commitment to the Psychosocial Aspects of Pediatric Care*, 108 PEDIATRICS 1227, 1228 (noting the "struggles of working parents" as a challenge to curbing obesity); *see also* Brad D. Berman et al., *After-School Child Care and Self-Esteem in School-Age Children*, 89 PEDIATRICS 654, 655-59 (1992) (stating that lower-socioeconomic families often require their children to care for themselves or their siblings after school, and a possible consequence of afterschool self-care and sibling care is obesity); Heidi Evans, *Surge in Childhood Obesity Prompts Focus on Healthy Nutrition*, CHARLESTON GAZETTE, Feb. 2, 2003, at 13F ("[B]usy, working parents are not always present to supervise meals. Fast food is a ubiquitous convenience.").

344. J. Michael McGinnis et al., *The Case for More Active Policy Attention to Health Promotion*, 21 HEALTH AFF. 78, 86 (2002) (concluding that children overeat "unhealthy foods because of the absence of supermarkets in low-income neighborhoods"); Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 357-58 (2003) (noting a lower percentage of grocery stores in urban areas as compared to suburban areas, as well as a lack of readily available healthier foods such as fresh fruits and vegetables); Gerald Hass, *Fast Food, Fat Kids*, BOSTON GLOBE, Dec. 23, 2002, at A19 (noting that supermarkets are 30% less prevalent in lower-income neighborhoods).

tend to skip breakfast, eat fewer vegetables, and eat more "junk food" than any other demographic segment.[345]

Likewise revealing, children have become less physically active, and thus expend fewer calories than children of previous generations. Notably, this trend has been observed by parents, as 33% find their children exercise less than they did at the same age.[346] Indeed, often at the expense of outdoor activity, American children are spending an increasing amount of time watching television, surfing the Internet, or playing videogames.[347] These behavioral modifications appear even more meaningful when coupled with the diminished availability of physical education programs.[348]

Therefore, the surge in childhood obesity may reflect socioeconomic adaptations as much as, if not more than, subterfuge or disingenuity on the part of the fast food industry. Moreover, parents appear partly accountable, as they exhibit considerable awareness of their children's eating habits and physical activities, a suggestive corollary in light of their predilection to significantly influence the choice of meals and levels of consumption among their children. On the other hand, the child-centered marketing strategies of fast food companies clearly resemble those employed, and later discredited by the tobacco industry. More importantly, the strategies of these two industries have each procured consequences that impair public health and undermine efficient allocation of public expenditures. In light of this ambivalent conclusion, perhaps it would be wise to contemplate the construction of a duty to warn that could respond to such disparate explanations.

d. Adequacy of Warnings

Beyond exploring a possible duty on the part of fast food companies to warn consumers of their foods' nutritional content rests the exploration of sufficient and optimal formats for any required warnings. For instance, would such a warning need to replicate the familiar "nutrition facts" format imposed by NLEA, or would current voluntary methods (that is, over-the-counter requests or online access) be deemed acceptable?

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345. Naylor, *supra* note 332; *see also* David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 411 (2001) (finding that single-parent households are associated with diminished control and supervision of children's behavior).

346. *See* Connelly, *supra* note 339.

347. *See supra* note 91 and accompanying text.

348. *See supra* note 122 and accompanying text.

Generally, warnings associated with food and drugs may be judged inadequate if their tone, placement or typeface fails to generate the consumer's notice;[349] if they are obscured by surrounding advertising content;[350] or if they fail to provide clear instructions for avoiding or minimizing risk.[351] As discussed in Part II, fast food restaurants have begun to supply nutritional information on their websites or upon request at the counter. Yet, in doing so, they utilize varied formats, incomplete information, and promotional language.[352] Likewise raising doubts as to the sufficiency of existing informational channels, nutritional data provided *after* the point of sale proves significantly less informative than that offered before purchase.[353] Moreover, up to 40% of Americans remain without Internet access,[354] thus suggesting that online nutritional content fails to attract the attention of many customers.

Along these lines, by only *inviting* consumers to learn about their products' nutritional content, whether by accessing a company website or requesting information at the counter, fast food companies, at least conceptually, risk conflict with recent case law that regards invitations to learn of warnings as inferior to direct warnings. Consider, for instance, how California courts have treated invitations to learn of carcinogenic and toxic substances within consumer products. In *Ingredient Communication Council, Inc. v. Lungren*, store signs, public advertising, and an 800 number were deemed legally insufficient upon comparison to the "clear and reasonable warning to consumers" supplied by product labels.[355] Specifically, the mere opportunity to be

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349. *See, e.g.*, Seley v. G.D. Searle & Co., 423 N.E.2d 831, 837 (Ohio 1981) ("A warning may be found to be unreasonable in that it was unduly delayed, reluctant in tone or lacking in a sense of urgency."); Kearl v. Lederle Labs., 218 Cal. Rptr. 453, 465-67 (Ct. App. 1985) (stating that a manufacturer of an oral polio vaccine failed to provide the requisite tone for the danger of side effects of the vaccine). *See generally* Noah, *supra* note 323, at 347 (offering a probative discussion of warnings).

350. *See, e.g.*, Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 560 (9th Cir. 1995) (holding that advertising for products which require warnings must present those warnings clearly); Davis v. Wyeth Labs., Inc. 399 F.2d 121, 130 (9th Cir. 1968) (finding that, in advertising for widespread distribution of polio vaccine, the warning in the advertising must reach the potential users directly).

351. *See, e.g.*, Richards v. Upjohn Co., 625 P.2d 1192, 1196 (N.M. Ct. App. 1980) (stating the need for manufacturers to provide clear instructions in order to avoid risks inherent in food and drugs); Tenuto v. Lederle Labs., 695 N.Y.S.2d 259, 266 (Sup. Ct. 1999) (concluding that the failure to include available information about avoiding the risk of contacting polio raised an issue of fact as to whether the drug manufacturer provided reasonable instructions).

352. *See supra* Part II.B.

353. *See supra* note 169 and accompanying text (explaining findings of the FTC).

354. *Id.*

355. 4 Cal. Rptr. 2d 216, 223 (Ct. App. 1992).

warned was thought to require excessive effort of the consumer, and since most consumers would not expend such "considerable effort," the actual warning would ultimately protect too few consumers.[356]

Certainly, while carcinogenic and toxic substances are qualitatively different and more harmful than any known contents of fast food, applying the principle of *Ingredient Communication Council* to fast food labeling proves intriguing nevertheless. To the extent fast food companies disclose nutritional content, they typically invite customers to request nutritional information, either at the counter or on the Internet, rather than provide direct, and automatically observed labeling on cartons or menus. Considering that a normal fast food patron has chosen to eat at such a restaurant in part because of the speed at which he will obtain his meal,[357] having to engage in a separate request may be deemed "considerable effort." By deduction, then, such "invitations" to nutritional disclosure likely inform few patrons.

It stands to reason, therefore, that should fast food companies bear a common law duty to warn of their foods' nutritional content, their current methods of disclosure would likely be judged inadequate. Not only are they varied, incomplete, and often surrounded by advertising content, they also represent mere invitations to be warned, which likely yield minimal transmission of information.

2. LINKING FAST FOOD WITH OBESITY AND DISEASE: A CHALLENGE IN CAUSATION

Upon determination of any common law duty to warn of fast foods' nutritional content, the causal linkage between failing to satisfy that duty and the resulting health ailments of certain patrons would then require examination. Two types of causal linkages are contextually most plausible, although both appear attenuated nevertheless. The first would

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356. *Id.* at 224–25. The California Court of Appeals held:

> Any meaningful definition of "availability" prior to exposure must similarly consider the probability of the prospective consumer seeing or hearing the warning message. Availability of the warning message . . . must mean more than the possibility a consumer would be apprised of the specific warning message only through considerable effort. An invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product.

Id.

357. *See* Cheryl Rosen, *McDonald's Serves Up Faster Payment System*, INFORMATIONWEEK, Jan. 15, 2001, at 81 (noting discernable fast food customer interest in obtaining food quickly), *available at* http://www.informationweek.com. This desire is also observable through customer interest in purchasing items at the drive through windows, rather than in the store. *See* Fran Hawthorne, *Drive Right Up and Don't Get Out*, N.Y. TIMES, Oct. 22, 2003, at G2.

originate upon a fast food company deceptively advertising products, followed by a consumer observing such advertising and then overconsuming those products, the consumer then becoming obese because of such overconsumption, and, lastly, the consumer suffering illness triggered by the onset of obesity. Alternatively, the causal linkage may start at the processing plant, where allegedly addictive ingredients are coupled with deceptive content to promote overconsumption, which, in turn, causes certain patrons to become obese, and then acquire ailments resulting from their obesity.

The two linkages essentially combine the two forms of causation required under most state laws: cause-in-fact and proximate cause. That is, a plaintiff must first demonstrate that the fast food company's conduct (that is, deceptive advertising or addictive or harmful ingredients) is the ultimate cause-in-fact of the plaintiff's injuries—obesity-related health ailments—where the injuries would not have occurred but for that conduct.[358] Establishing cause-in-fact can prove ambitious. For instance, while it may be predicated upon circumstantial evidence, such evidence must not be speculative.[359] Along these lines, "the mere possibility" that certain conduct may have been the cause of a particular harm shall not be considered a sufficient link between the two.[360]

Unlike lung cancer and smoking, or breast cancer and silicone breast implants, obesity and fast food consumption are not a necessary pair. Indeed, obesity can be triggered by a number of considerations, including lack of exercise, genetic predisposition, or overconsumption of various foods.[361] Moreover, fast food, unlike cigarettes, is not, by any scientific measure, "addictive,"[362] and irrespective of any deceptive advertising, consumers may gravitate toward fast food simply because of taste. Market studies, in fact, suggest that fast food patrons make their

358. *See, e.g.*, United States v. St. Louis Univ., 336 F.3d 294, 302 (4th Cir. 2003) (evaluating Missouri law that requires the plaintiff to show that his injuries "would not have occurred but for that conduct"); *see also* Selph v. Evanoff, 184 N.W.2d 282, 285 (Mich. Ct. App. 1970) (holding that proximate cause is that which "produces injury and without which such injury would not have occurred"). For a thorough discussion of causation, see ABRAHAM, *supra* note 283, at 99-136.

359. *See, e.g.*, Donley v. Amerada Petroleum Corp., 106 P.2d 652, 655 (Kan. 1940) (finding that circumstantial evidence must indicate a reasonable inference of causation); Skinner v. Square D. Co., 516 N.W.2d 475, 480 (Mich. 1994) (stating "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation").

360. Irwin v. Odyssey Contracting Corp., 61 Fed. Appx. 150, 153-54 (6th Cir. 2003); Jordan v. Whiting Corp., 240 N.W.2d 468, 471 (Mich. 1976).

361. *See supra* Part I.C.

362. *See supra* notes 276-77 and accompanying text.

selections primarily on the basis of perceived taste, rather than on price or health implications.[363]

Along with the arduous task of establishing cause-in-fact, a plaintiff in an obesity-related suit must also substantiate the existence of proximate cause, meaning the resulting injury of obesity must not be "too attenuated" from any initial conduct by a fast food company.[364] That is, if a fast food company could not reasonably foresee that its allegedly deceptive advertising or its addictive ingredients would *cause* a group of individuals to overconsume fast food, which, in turn, would *cause* them to become obese, and their obesity would then *cause* them to acquire obesity-related diseases, then the causal linkage would break.[365]

In addition, since multiple causes of obesity exist, the conduct of a fast food company must be shown as "substantial" in order to satisfy the contours of proximate cause.[366] Several factors are often considered when assessing whether a particular cause shall be considered "substantial," including whether the event would have occurred without the cause,[367] as well as the proportional harm triggered by each cause.[368] In contrast to the direct and often exclusive link between smoking and lung cancer, overconsumption of fast food likely serves as a contributing, though not necessarily "substantial" cause of obesity.

Indeed, given the probable existence of multiple explanations (for example, consumption of non-fast food, exercise regimen, metabolic absorption rate, cellular structure, and physiological factors), determining whether the overconsumption of fast food shall be considered "substantial" requires assessment of whether such obesity would have arisen regardless, as well as a survey of the proportional

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363. *See supra* Part I.D.

364. *See St. Louis Univ.*, 336 F.3d at 302.

365. *See id.* ("The requirement of proving proximate cause absolves those actors whom it would be unfair to punish because of the attenuated relation which their conduct bears to the plaintiff's injury . . . [which] must be a reasonable and probable consequence of the act or omission of the defendant."). Moreover, proximate cause is deemed to be "a limitation the law imposes upon the right to recover for the consequences of a negligent act." *Id.*; *see also* Dedes v. Asch, 590 N.W.2d 605, 609 (Mich. Ct. App. 1999) (noting how proximate cause serves to limit legal responsibility).

366. *See* Elsroth v. Johnson & Johnson, 700 F. Supp. 151, 166 (S.D.N.Y. 1988).

367. *See id.* For a discussion on how courts address whether an event would have occurred without the cause, see WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 240 (4th ed. 1971).

368. *See, e.g.*, Cox v. City of Dallas, 256 F.3d 281, 301 n.37 (5th Cir. 2001) (stating that liability in a torts lawsuit depends upon each party's contribution to the harm); Transam. Ins. Fin. Corp. v. Fireman's Fund Ins. Co., No. 89 Civ. 8625 (PNL), 1992 WL 350800, at *9 (S.D.N.Y. Nov. 19, 1992) (stating that the "test to determine whether a defendant's conduct constitutes a substantial factor" requires an analysis of each actor's contributions toward the harm).

harm assessable to each cause.[369] Granted, this type of analysis would vary by individual patron, but in representing the only known standard to date, *Pelman* opines that one must frequent a fast food restaurant "more than once per week" for that restaurant's products to be considered a substantial cause.[370] Perhaps revealingly, 72% of McDonald's patrons visit one of their franchises at least once a week,[371] meaning that a sizable number of obese fast food patrons could theoretically satisfy the *Pelman* standard, provided other variables do not interfere.

On the other hand, merely concluding that fast food overconsumption may, in certain instances, comprise a substantial cause of obesity does not then automatically link together a legally cognizable claim. The next, and similarly challenging, step would be determining whether obesity triggered the incidence of disease or whether other factors (for example, genetic predisposition or environmental circumstances) precipitated such illness. For some diseases, such as Type 2 diabetes, correlating obesity proves relatively easy. For others, such as hypertension or heart disease, the link proves more onerous.[372]

Clearly, a muddled, though theoretically plausible causal chain exists between the overconsumption of fast food, obesity, and the incidence of disease. At best, therefore, the requisite forseeability of fast food companies to warn of their foods' content appears uncertain. Only making the viability of an obesity-related claim against the fast food industry more conjectural are economic considerations that diminish the expected return of potential damages. Those considerations will be explored in the following Subsection, as they may supply systemic deterrents to the very root of obesity-related claims.

3. ECONOMIC DAMAGES OF A LESSER KIND: A BURGEONING SCHEME OF DISINCENTIVES

Beyond the conceptual challenges of proving legal duty and causation, obesity-related claims may encounter a diminishingly remunerative landscape for tort and class actions, thus making them

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369. *See Cox*, 256 F.3d at 301 n.37. This mode of analysis was discussed in *Pelman I*, 237 F. Supp. at 539 (noting that "in order to allege that [McDonald's] products were a significant factor in the plaintiffs' obesity and health problems, the Complaint must address these other variables and, if possible, eliminate them").

370. 237 F. Supp. 2d at 539.

371. *See supra* note 326 and accompanying text.

372. *See generally* Ross C. Brownson & Frank S. Bright, *Chronic Disease Control in Public Heath Practice: Looking Back and Moving Forward*, 119 PUB. HEALTH REP. 230, 233 (2004) (explaining how hypertension and other diseases are sometimes associated with the incidence of obesity).

potentially poor vehicles for financial recompense. Most notably, the 108th Congress shall soon deliberate the Class Action Fairness Act of 2004 ("Fairness Act"),[373] legislation that would substantially curtail jury awards in class actions.[374] One provision of the Fairness Act bears particular mention, as it would transfer all class actions worth in excess of $5 million to the federal courts, which typically provide substantially smaller jury awards.[375] Consequently, passage of the Fairness Act would truncate the expected rate of return of most class actions,[376] thereby modifying the risk or reward ratio for claimants and their attorneys, and, in the aggregate, making such lawsuits less likely to arise.

Similarly meaningful, the U.S. Supreme Court has actively sought to decrease the expected value of class actions. Specifically, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court, by a six to three vote, ruled that punitive damages must proportion actual harm suffered, and that disproportionate punitive damages would violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[377] Purely from the standpoint of economic expectations, *State Farm*, like the Fairness Act, depreciates the expected value of a class action suit, thus discouraging parties from expending the significant costs often required to create a viable class.[378] Moreover,

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373. S. 2062, 108th Cong. (2004).

374. *See id.* § 4. Specifically, the Fairness Act would make class actions filed in state courts removable by any defendant if (1) the aggregate damages sought exceed $5 million, and (2) one or more parties are from different states (unless more than two-thirds of the class are from a single state). *Id.*

375. *Id.* For a discussion of the tendency of federal courts to provide substantially smaller jury awards, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 995 (2003).

376. Assuming passage of the Fairness Act, most class actions would be subject to removal to federal court, since most involve one or more parties from different states. *See Senate Proceeds with Class Action Bill*, 7 CONSUMER FIN. SERVS. L. REP. 14 (2004).

377. 538 U.S. 408, 429 (2003) (overturning a $145 million award against State Farm for mishandling an insurance claim). Note also that appellate courts have recently become willing to reduce jury awards in class action suits. *See, e.g.*, *In re* Exxon Valdez, 270 F.3d 1215, 1246 (9th Cir. 2001). *See generally* Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114 (2004) (arguing in favor of reduced jury awards). For instance, in May 2003, a Florida appellate court overturned a $145 billion claim against five tobacco firms. Liggett Group, Inc. v. Engle, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003).

378. For a discussion on the extensive costs of forming a class, see Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998). As a separate cost, also consider the collective action problem often identified in forming a class. *See* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187, 2208

and largely due to the amorphous, and likely immeasurable "harm" suffered by fast food patrons, this disincentive would appear particularly considerable when persuading a class of individuals to sue the fast food industry. That is, how would a court sufficiently "punish" and "deter" the fast food industry, when such damages must "proportionate" a potentially unobservable amount of harm, or risk violating due process?[379] Suggestively, then, these disincentives and unpredictabilities make the very emergence of such a class less probable.

A final systemic deterrence also bears mention: consider that plaintiffs' attorneys in class actions typically receive 30% to 50% of class action settlements and judgments.[380] Similarly, only 20% of civil liability awards represent genuine recompense[381] and since the cost of litigation tends to increase over time, such a share of recompense should accordingly decline. In other words, by their very nature, class actions may constitute inefficient methods to remedy any harm suffered by fast food patrons, as such patrons would receive only a fraction of the proscribed restitution.[382]

Therefore, aside from the ambitious task of establishing both the existence of a legal duty on the part of fast food companies to warn of their foods' contents, as well as causation resulting from failing to satisfy such a duty, prospective plaintiffs in obesity-related class actions are likewise deterred by systemic changes in the American tort system which have diminished the prospective value of class actions. Indeed, the inherent calculation of costs and benefits associated with such litigation has evolved into one of greater cost and lesser benefit, thus diminishing the very incentive to commence suit.

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n.92 (2000).

379. Per the decision set forth by Justice Kennedy in *Campbell*, the "punishment" element of punitive damages, if applied to fast food companies, must be "both reasonable and proportionate to the amount of harm to the [fast food patron]." 538 U.S. at 426.

380. *See* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 88–89 (2003).

381. *See The Lawsuits of Madison County*, ECONOMIST, June 23, 2003, *available at* http://www.economist.com.

382. This seems especially true when considering the likely resources that would be expended by the fast food industry—a $110-billion-a-year industry—in challenging prospective judicially imposed changes to its business model. Keep in mind: many of these restaurants appear rather sensitive when encountering even light-hearted critique of their product. For a colorful example, note how McDonald's recently flexed its muscle by suing Edoardo Raspelli, an Italian food critic, for defamation in Italy, after he told an Italian newspaper, "'Gastronomically speaking, I find [McDonald's] meals repellent. Those rinky-dink, wilting hamburgers; those obscene French fries that taste like cardboard . . . but that's enough. I feel sick just talking about it.'" Ken Dilanian, *McDonald's Sues: A Grilling for a Critic Who Has a Beef*, PHILA. INQUIRER, June 18, 2003, at A1.

On the other hand, should such lawsuits prove impossible or impracticable, then fast food patrons will continue to consistently underestimate the contents of fast food, and the likelihood that fast food serves as a significant contributor to obesity and obesity-related diseases will remain ignored. This is troubling not only for the health of those patrons, but also for society at large, given the rising cost of obesity for taxpayers and businesses alike. As a result, remedying and preventing any harm caused by inadequate or nonexistent warnings related to fast food consumption invites discussion of perhaps more corrective methods. As will be explored in the next Part, the uncertain duty to warn under state law may be displaced by explicit state and federal regulatory requirements, thus heightening predictability of legal norms and enhancing the efficiency of public expenditures.

V. PROPOSING A NEW LEGAL FRAMEWORK TO DETER OVERCONSUMPTION

In 2003, approximately 180 bills or resolutions mentioning the word "obesity" were introduced in state legislatures, an increase of over 150% from 2002.[383] Although many of these bills, such as a tax on movie tickets, would only tangentially impact the link between fast food and obesity, they nevertheless suggest an increasing societal awareness of the obesity epidemic.[384] Moreover, a small fraction of these bills reflect a targeted concern for the absence of notification of fast food's nutritional contents. This is especially evident in perhaps the most foreseeable state legislative reform to address the link between fast food consumption and obesity: extending the provisions of NLEA to restaurants, so that a statutory duty to warn is required of them and requiring the warning to be evident at the point of sale.

Legislators from New York and Maine have introduced legislation that would largely accomplish the extension of NLEA. In New York, the Act to Amend Public Health Law, in Relation to the Posting of Caloric Value, Carbohydrate, Fat and Sodium Content of Food Items would compel all restaurant chains to list caloric, sodium, carbohydrate, and fat levels on a standard, printed menu; for establishments with only

383. *See* Susan Lindt, *Too Many Kids Getting Too Big for Their Health*, LANCASTER INTELLIGENCER J., Aug. 5, 2003, at A1 (noting also that seventy-two such bills were introduced in 2002).

384. *Id.* Kelly Brownell, director of the Yale Center for Eating and Weight Disorders, stated: "Many of these bills are as important for what they represent as what they can actually accomplish. The fact these are even part of the public discourse is a sign that there is very real concern about obesity and people want something done about it." *Id.*

menu boards, only calorie information would be required.[385] Likewise, in Maine, the Act to Provide Consumers at Chain Restaurants with Accurate, Accessible Nutrition Information would require that restaurant menus supply nutritional information in a format "similar to the categories of nutrition information provided on packaged foods sold in grocery stores"; restaurants without menus would instead have to hang menu boards containing caloric levels of each item.[386]

These two state legislative efforts offer some conceptual promise.[387] Most importantly, they would equalize nutritional notification laws among all food distributors and vendors, so that the same duties and burdens placed on the grocery and food packaging industries would be placed on the restaurant industry. Likewise significant, they would enable consumers to anticipate notification in a uniform format, and at the point-of-sale, rather than encountering haphazard notification at less meaningful points in time. Considering that most Americans routinely underestimate the potentially harmful contents of fast food, consumer choice would thus likely be enhanced.

Primarily for reasons discussed earlier,[388] however, the restaurant lobby has successfully opposed these bills, and only one remains viable.[389] Nevertheless, since these bills raise the specter of nutritional notification, they invite the theory of consumer choice to help construct a new theoretical framework under which optimal models to curb obesity may arise.

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385. Assemb. B. 5520, 226th Leg., Reg. Sess. (N.Y. 2003), *available at* http://assembly.state.ny.us.

386. L.D. 391, 121st Leg., Reg. Sess. (Me. 2003), *available at* http://janus.state.me.us/legis/LawMakerWeb/search.asp.

387. The proposed California Uniform Retail Food Facilities Act would essentially require the same from restaurants in California as would the New York and Maine bills, but it would offer an alternative, and less invasive choice, whereby restaurants would be required only to disclose nutrition data on demand and display signs saying that such information were available. *See* S.B. 679, 1st Sess. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/bill/sen/. Thus, it would essentially only make law the current practice of most fast food restaurants. More generally, the promise offered by these proposals reflects greater social and academic awareness of the need to address obesity. *See e.g.*, Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. (forthcoming 2004) (exploring the link between behavioral economics and obesity).

388. *See supra* Part II.B.

389. Specifically, New York's Act to Amend the Public Health Law, in Relation to the Posting of Caloric Value, Carbohydrate, Fat and Sodium Content of Food Items remains before the Committee on Codes. *See* N.Y. Assemb. B. 5520. Maine's Act to Provide Consumers at Chain Restaurants with Accurate, Accessible Nutrition Information died in the Senate. *See* L.D. 391. California's Uniform Retail Food Facilities Act was rejected in subcommittee. *See* Ca. S.B. 679. For a discussion of the political challenges to these types of reforms, see Pressler, *supra* note 168, at E1.

As canvassed in Part I, individual food choices vary widely, from the "fast food junkie" to the "fitness freak" and the theory of consumer choice may help predict how iudividuals along that spectrum arrive at their food selections, and thus whether increased awareness of nutrition would appreciably impact one's food choice. Abstractly, the theory of consumer choice finds that individuals determine the relative utility of one choice over another, balanced against abilities and budgetary constraints, which attach a relative cost to each prospective choice. For most consumers, food "utility" may be measured by some combination of taste and nutrition, while "abilities" refer to accessibility to those food items, and "budgetary constraints" simply refer to how much money the consumer can and is willing to spend on food. Each time someone decides to eat, these variables intersect to procure a food choice.

Applying the theory of consumer choice to fast food consumption proves quite intriguing in light of this Article's findings. Specifically, since fast food patrons tend to value taste more so than any other food characteristic, it follows that the typical fast food patron ascribes a higher food "utility" to taste than to nutrition, and it is likewise plausible that this patron is unable or unwilling to spend significant resources on food. This seems especially plausible upon considering that the commercial failure of "light" menu items has been attributed to fast food patrons' tendency to "talk about nutrition" but then "buy on taste."[390] Moreover, since fast food patrons tend to be regular customers rather than infrequent visitors, it is likewise plausible that they are unable or unwilling to expend significant resources on food. In stark contrast, a health-conscious person tends to place a higher value on nutrition than taste, and since healthy food tends to be more expensive than fast food, that person likely can and will spend more money on food. Therefore, at least superficially, labeling for fast food items appears unnecessary: the typical fast food patron already knows that such food contains relatively innutritious content. Paradoxically, a more health-oriented consumer would not eat fast food because her consumer choice variables would not yield a decision to eat such food.

Although this paradigm seems appealing, it is based on faulty premises. Namely, though fast food patrons likely place less significance in nutritional data than do more health-conscious persons, their reasoning is partly based on certain general assumptions about fast food and its nutritioual characteristics that, in the aggregate, underestimate the extent to which that food is fattening and high in calories.[391] To illustrate, if the typical fast food patron assumes that a

390. *See supra* Part I.D.
391. *Id.*

"Double Whopper with Cheese" contains about 600 calories, would he still select that item if he knew that it actually contains almost 1100 calories? Considering that the average person underestimates fast food's caloric content by 56%, this assumption proves relevant to everyday food choices.[392]

Along these lines, it stands to reason that most, if not all, fast food patrons ascribe greater than "zero" significance to nutrition; relatively speaking, they may not care deeply about nutrition, but to assume they are indifferent seems exceedingly unlikely, if not implausible.[393] Thus, the food consumption preferences of many fast food patrons are derived in part from inaccurate information. Suggestively, the ordering of such preferences could change with proper nutritional notification, thus yielding different food consumption choices. In practice, would enhanced nutritional labeling dictate that a fast food patron would never again eat fast food? No, but perhaps instead of frequenting fast food restaurants four times a week, he would do so only twice; or perhaps instead of selecting a "Double Whopper with Cheese," he would choose a "Single Whopper without Cheese." Over time, and in the aggregate, moderated consumption of fast food would likely diminish national rates of obesity, thus reducing the cost of obesity on taxpayers and businesses alike. On the other hand, since fast food patrons most significantly value taste, predicting such effect on consumption proves conjectural.

Accordingly, exploring potential models by which the law might facilitate the transmission of nutritional information to fast food patrons may help identify the paradigmatic method, thereby enhancing consumer choice and optimizing social and economic policy.

A. Model I: Duty of Absolute Notification

Perhaps the simplest approach to compel nutritional disclosure from fast food restaurants would be to amend NLEA and remove the labeling exemption for all restaurants. Specifically, 21 U.S.C. § 343 could be modified by eliminating subsection (q)(5)(A)(i), which currently states, "subparagraphs (1), (2), (3), and (4) shall not apply to food—(i) which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in

392. *See supra* note 80 and accompanying text.

393. Indeed, if fast food patrons were indifferent about nutrition, most studies would indicate nominal concern about nutrition. *See supra* Part I.D. More speculatively, one may ponder why fast food companies only televise commercials with fit-looking employees and customers, especially when those customers are children, if images of good health were irrelevant. *See supra* Part I.E (discussing food advertising aimed at children).

such establishments."[394] Borrowing from the Maine and New York legislative proposals, subsequent regulations could then ensure that such notification arises at the point-of-sale. Model I would be the plainest way to confirm that fast food patrons receive the same nutritional knowledge aseribed by NLEA that is afforded to consumers in grocery stores and other retail outlets.

The type of simple solution offered by Model I, however, contains several conceptual drawbacks. First, by affecting all restaurants, Model I procures consequences beyond its intended purpose—that is, for *fast food* restaurants to notify consumers of their foods' content. Along these lines, small diners and other nonchain restaurants, which often vary cooking styles depending upon season or the whims of individual chefs, may experience an undue burden in trying to assess the nutritional content of their dishes. Indeed, unlike fast food restaurants, most restaurant types are *not* renowned for their consistency of operation. Also, considering that most adult fast food patrons consume fast food with some, if imperfect, knowledge of the food's obesity-procuring substances, notification of precise contents may not change the eating decisions of most adult patrons. This is especially true upon considering the implicit, albeit imprecise, notification function of "light" or "low fat" menu items.

B. Model II: Duty of Notification Tailored to Fast Food Restaurants

Alternatively, Model II would mimic Model I, except limit the NLEA exemption to fast food restaurants, rather than embody all restaurants. To do so, the exemption stipulated in subsection (q)(5)(A)(i) could be reconstructed so that it concluded with a new phrase:

> (i) which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments, *provided those restaurants or establishments do not, at any of their individual locations or franchises, either (a) offer delivery of food through drive-through windows; or (b) dispense food at food courts in retail outlets including, but not limited to, shopping malls, airports, and schools.*

Therefore, concerns of diners and other non-fast food restaurants would be allayed.

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394. 21 U.S.C. § 343(q)(5)(A)(i).

A variation of Model II was recently proposed by U.S. Representative Rosa DeLauro (D-CT) and U.S. Senator Tom Harkin (D-IA). The Menu Education and Labeling Act[395] ("MEAL") would require that all chain restaurants[396] print the caloric, fat, and sodium content of each menu item (thus requiring some of the listing requirements proscribed by NLEA). Since all chain restaurants would be affected, non-fast food restaurants such as Morton's Steak House and Legal Seafoods would be statutorily included. Considering those restaurants, like fast food restaurants, share identical operational procedures as individual franchises, their inclusion may initially appear desirable.[397]

On the other hand, unlike at fast food restaurants where meals are prepared according to company-established procedure, non-fast food restaurant chains employ chefs, and they offer cooking variations that may affect the dish's ultimate nutritional content. To illustrate, consider that the temperature and manner in which a steak is cooked can result in significantly different nutritional content.[398] Thus, by affecting these non-fast food restaurants, MEAL may exceed the scope of suitable notification and prove incompatible with accurate nutritional assessment for consumers. Moreover, considering that most adult fast food patrons consume such food with some, if imperfect, knowledge of its obesity-procuring substances, proposals such as Model II or MEAL may conceptually overreach.

C. Model III: Duty of Notification Tailored to Fast Food Aimed at Children

Before contemplating Model III, it may prove judicious to reflect upon certain analyses within this Article. To start, recall that fast food companies focus their advertising resources on attracting young customers. Considering that children, unlike adults, often lack the requisite cognitive skills to weigh the short-term and particularly long-term, consequences of consumption decisions, they are especially receptive to these efforts. Perhaps, in part for that reason, the percentage of children consuming fast food has surged rapidly over the past twenty years, as has the proportion of children that are overweight. While socioeconomic changes, such as diminished physical activity and

395. S. 2108, 108th Cong. (2004), H.R. 3444, 108th Cong. (2003).

396. "Chain restaurants" are defined as restaurants with twenty or more franchises. H.R. 3444 § 3.

397. For instance, individual franchises employ standard menus and employee uniforms. For a discussion on shared practices, see Frumkin, *supra* note 173, at 1.

398. *See* Candy Sagon, *Ask 6 Meat Mavens How to Cook the Perfect Steak and You'll Get 7 Opinions*, WASH. POST, June 11, 1997, at E1.

fewer meals prepared at home, have contributed to aggregate weight gain among children, augmented consumption of fast food has also proven salient. Though the detriments of such weight gain are borne most noticeably by obese children, taxpayers also suffer, particularly since half of the costs of obesity represent public expenditures,[399] and four out of five children who become obese will remain so for the rest of their lives.[400] Along those lines, since the food preferences of adults are predominantly shaped by their eating habits as children, the consumption choices of today's youth will impact future taxpayers, as well as the allocation of public resources for much of the twenty-first century. Therefore, illuminating the unique dynamics of fast food consumption among children appears especially worthwhile, and perhaps the most salient rationale for nutritional notification of any restaurant food.

To accomplish this goal, Model III proposes that fast food restaurants generate full nutritional disclosure for items aimed at young children, that such diselosures utilize the NLEA format, and that it be made available at the point-of-sale. Specifically, the exemption stipulated in section 343(q)(5)(A)(i) of the NLEA to exclude only restaurant meals aimed at a general audience would be amended to conclude with a new phrase (in italics):

> (i) which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments, *provided those restaurants or establishments do not, at any of their individual locations or franchises, either (a) offer delivery of food through drive-through windows; or (b) dispense food at food courts in retail outlets including, but not limited to, shopping malls, airports, and schools, and provided those foods are not intended primarily for customers under the age of 14.*

To illustrate this concept, Model III would require nutritional disclosure for many popular "kids menu" items, such as McDonald's "Happy Meal" or Burger King's "Big Kids Meal," but not for such regular menu items as McDonald's "Big Mac" or Burger King's "Whopper."

Quite simply, Model III would alert the parents of young patrons as to the nutritional value of their menu choices. From a conceptual standpoint, Model III would capitalize on three unique characteristics inherent in this particular decision-making process, namely parents'

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399. *See supra* note 26 and accompanying text.
400. *See supra* note 89 and accompanying text.

tendency to: (1) decide which items their young children will consume; (2) choose "kids menu" items upon making a selection;[401] and (3) place a significantly higher premium on nutrition and lower tolerance of risk in that setting than when choosing items for themselves, older ehildren, or other adults. Thus, in the consumer choice paradigm, the disclosure of nutritional content would likely affect the food "utility" considerations of a parent selecting an item for her child, since in that context, and perhaps only in that context, the relative value of "nutrition" to "taste" is absolute and, as discussed extensively in Part I, there exists considerable discrepancy between presumed and actual caloric content of fast food items. At the same time, Model III avoids the inefficiencies inherent in Models I and II—namely, the imposition of unnecessary and cumbersome costs upon diners and other chain restaurants. Similarly, by merely requiring nutritional labeling of fast food companies, Model III would impose a relatively modest cost, particularly when compared to more discriminatory and regressive schemes, such as an obesity tax[402] or a tax on fast food.[403]

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401. Although sales data suggest that parents of young children most often choose items from "kids menus," it remains to be seen how the recent incorporation of "dollar menus"—where, for instance, a McDonald's patron can purchase a double cheeseburger for only ninety-nine cents—might affect the parental meal selection process. Indeed, note the sharp price difference between the ninety-nine cents cheeseburger and the $3.25 Happy Meal. If subsequent data reveals an increasing parental tendency to select "adult" menu items for their children, then universal fast food labeling should be more seriously considered and likely endorsed.

402. The "Fat Tax" concept has generated recent attention, especially in Europe. For instance, the German Finance Minister, Hans Eichel, proposes that overweight Germans pay more in taxes in order to relieve expanding health care costs. See *First Light*, EDMONTON SUN, Sept. 11, 2004, at 2. In theory, such a tax could require that overweight persons pay a tax or those of normal weight receive a refund. Either way, taxpayers would observe unmistakable incentives to stay fit. However, aside from myriad practical problems in auditing payment, as well as the sheer political impossibility of a "fat tax," consider also its regressivity: as discussed in Part I.B, there exists an inverse relationship between weight and socioeconomic status, meaning that poorer Americans would likely bear a disproportionate burden of any "fat tax." *Supra* Part I.B. Equally important, as discussed in Part IV.B, obesity can be triggered by a number of factors, including ascribed characteristics such as genetic predisposition or slow metabolism. *Supra* Part IV.B. Thus, for some, taxing one's weight could be the equivalent of taxing one's race or age. To cement the incongruity of this idea, consider that forty-three out of the fifty baseball players who played in the 2004 World Series were technically overweight, and could thus be eligible to pay a "fat tax." *See Heavy Hitters: Forty-Three Out of 50 World Series Players Are Considered Overweight by Federal Government*, Oct. 27, 2004, PR NEWSWIRE, LEXIS, News & Business, Wire Service Stories, BUS. WIRE.

403. Unlike a "fat tax," a "fast food tax" has proven attractive to at least a handful of American legislators. For instance, in 2003, New York Assemblyman Felix Ortiz proposed a 0.25% sales tax on fast food items. See Marguerite Higgins, *Food Fight*, WASH. TIMES, Oct. 19, 2003, at A1. At first glance, a fast food tax seems

Aside from its conceptual advantages as applied to the consumer choice theory, as well as its advancement of meaningful public policy objectives, Model III can diffuse the desirability of the most plausible obesity-related class actions, which would involve young children suing fast food companies for failing to warn them of the dangers of overconsumption. Indeed, nutritional notification would put the parents on notice, and since they tend to select items for their children, it would raise the specter that they are better positioned than fast food companies to warn against the dangers of overconsumption. For that reason, Model III would propose immunity for fast food companies from such lawsuits. Therefore, while Model III would compel material and precisely tailored changes upon fast food companies in their delivery of food, it would offer them a corresponding indemnity from further and costly litigation.

VI. CONCLUSION

At first glance, it may appear slightly absurd to burden fast food companies with the legal duty to notify individuals, young or old, that fast food consumption may harm their health. Moreover, a duty to warn cannot ameliorate social phenomena and public policy preferences that have exacerbated obesity, particularly among youth. As explored in this Article, children increasingly spend time partaking in indoor, sedentary activities at the expense of outdoor, physical exertion. This trend is

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promising, as it would presumably encourage moderated consumption of fast food—thus sharing the same goal of nutritional disclosure. Nevertheless, taxes on food are perhaps the most regressive of all consumption taxes, since lower-income families spend a proportionately higher amount of their income on food. *See* Aaron Schwabach, *How Free Trade Can Slave the Everglades*, 14 GEO. INT'L ENVTL. L. REV. 301, 311 (2001).

Though a "fast food tax" would only discourage consumption of one type of food, consider that fast food prices are uniquely low, and unless such a tax would actually procure moderated consumption, it would likely raise the overall cost of family food purchases, either by encouraging consumption of more expensive substitutes, such as grocery products or restaurant dishes, or simply forcing families to absorb a higher cost for similar portions of fast food. The latter, and troubling, scenario seems more plausible when considering that families in lower-income neighborhoods frequently lack access to supermarkets, thus often regarding fast food as the most viable meal option. *See supra* Part IV.A. Regardless of how a "fast food tax" would modify their eating habits, those with the fewest resources would likely bear the greatest burden. Lastly, note how a "fast food tax" philosophically contrasts with nutritional disclosure: the former assumes that individuals cannot effectively utilize the latter. Indeed, while nutritional disclosure informs the consumer of the food's content, a "fast food tax" simply penalizes consumption, presupposing that individuals lack the capacity to process information. Though it is unclear which reform would best promote moderated consumption, "fast food taxes" have generated scant support and are not likely to secure passage in the near future.

only complicated by the diminishing presence of physical education in American schools. Similarly significant, fewer meals are eaten at home, principally because American parents work more days and longer hours than before, a development that discourages food preparation and leisurely dining. In other words, the overconsumption of fast food is merely one of many contributors to the obesity epidemic in America, and using legal theory to address it should be viewed in that limited light.

Likewise, objective analysis of nutritional labeling must also account for local constraints and resulting choices that have engendered opportunities for the overconsumption of fast food. For instance, consider that numerous public school committees have opted to lease school property to fast food companies, thus providing unfettered access to these companies' most coveted customers. Perhaps these school committees did so only after local taxpayers refused to augment school budgets, though such a premise would then beg the question of why taxpayers would choose lower taxes at the expense of their children's health. Alternatively, consider that most state governments have declined programs that would enhance children's awareness of the long-term consequences of obesity and overconsumption.

Aside from recognizing social phenomena and public choices that have enabled the growth of obesity, the optimization of nutritional labeling should also contemplate whether consumers might learn more if companies possessed market incentives, rather than regulatory duties, to provide the clearest nutritional information and in the most illuminating format. Specifically, consider that voluntary agreements have been associated with efficient transmission of data, particularly since they internalize unique circumstances and absorb market variances among industry participants. Moreover, a free market approach has already indicated a certain degree of voluntary fungibility on the part of the fast food industry, most notably evidenced by its introduction of "light menu" items as well as its posting of nutritional information on company websites.

On the other hand, voluntary agreements and market incentives have failed to create sufficient communication of dietary choices. Quite simply, collaborative projects between the fast food industry and governmental actors have been rendered deficient due to the absence of deterrence. Similarly, while light menus and online nutritional information supply advisement, they tend to do so in imprecisely implicit or incomplete, often obtuse, formats. Perhaps the failure of the free market to encourage optimal sharing of information is best evidenced by the absence of point-of-sale disclosure, the most effective method to convey nutritional information.

In light of these market defaults, contemplation of standardized nutritional disclosure appears desirable. This is particularly true since fast food patrons significantly underestimate the negative contents of their menu selections, a troubling finding given that consumption of fast food and rates of obesity have ascended over the last two decades. Perhaps more concerning, approximately half of the cost of obesity is borne by taxpayers, thus siphoning considerable public resources from other endeavors.

Along these lines, the recent wave of proposed legislation to enhance nutritional notification may reflect greater societal interest in improving dietary consumption and reducing obesity. However, these proposals largely ignore concepts of efficiency and effective communication of consumer choice. Specifically, a blanket imposition of nutritional labeling upon all restaurant and fast food items would ignore varying degrees of effectiveness, as well as the inherent cost-to-benefit ratios of different methods of labeling. Indeed, consumer choice theory suggests that most fast food patrons would markedly discount or disregard such information, since they place an exceedingly high premium on taste, while internalizing little value in nutrition. Therefore, in the context of adult fast food patrons, nutritional disclosure would likely yield minimal impact on aggregate fast food consumption, and thus fail to affect desirable public policy. Moreover, economic models predict that universal labeling requirements would needlessly burden certain types of diners and medium and high-end restaurants.

In contrast, a targeted approach to nutritional labeling can manifest functionality and precision. As explored in Model III, the consequences of nutritional disclosure limited to children's fast food items appear uniquely efficacious. This is true since parents tend to decide which items their young children will consume, they place an anomalously high premium on nutrition and avoidance of risk in contemplating that choice, and they tend to significantly underestimate the caloric content of fast food items. Thus, in the consumer choice paradigm, the disclosure of such nutritional content would reconfigure the food "utility" of various options for children, sinee in this setting the value of "nutrition" considerably exeeeds that of "taste." In short, consumer choice theory predicts that nutritional disclosure for children's fast food items would prove uncommonly meaningful.

Coupled with this finding, since nutritional notification would put parents on notice as to the contents of children's consumption choices and since they tend to select items for their children, they would be optimally positioned to warn against the dangers of overconsumption. For that reason, corresponding immunity for fast food restaurants from obesity-related lawsuits would likewise prove conceptually sound.

Nevertheless, as a possible nuance to this proposal, should growing price discrepancies between cheaper, "adult" menu items and more expensive, "kids" menu items reveal an increasing parental tendency to select adult items for their children, then universal labeling for fast food items should receive more serious consideration, and likely promotion.

By itself, targeted nutritional disclosure will not prompt a healthier America, and it should only be considered as part of a broader, antiobesity campaign. That is, better dieting, exercising, education, and public policy choices all must play a vital role in curbing obesity, and likewise, in reducing the taxpayers' burden caused by obese Americans. However, targeted nutritional disclosure of children's fast food items would play a principal, if not indispensable, role in truncating childhood obesity simply because it would procure a unique, if not anomalous, behavioral consequence that would considerably improve the eating habits of many children. Equally important, unlike more discriminatory and regressive proposals, such as an obesity tax or a fast food tax, targeted nutritional disclosure would only impose the modest cost of labeling, and only on the fast food industry. Plus, considering that four out of five children maintain their eating habits for the remainder of their lives, perhaps such disclosure may even create the first national diet that won't be broken.